(18)

No. 01-1107-CSY Title: Virginia, Petitioner
v.
Barry Elton Black, Richard J. Elliott, and Jonathan O'Mara

Docketed:
January 29, 2002 Court: Supreme Court of Virginia

Entry	Date	Proceedings and Orders
	Jan 24 2002	Petition for writ of certiorari filed. (Response due February 28, 2002)
	Feb 11 2002	Waiver of right of respondent Richard J. Elliott to respond filed.
	Feb 18 2002	Waiver of right of respondent Barry E. Black to respond filed.
	Feb 22 2002	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Feb 28 2002	Brief amici curiae of Arizona, et al. filed.
	Mar 13 2002	DISTRIBUTED for Conference of March 29, 2002
	Mar 25 2002	Response requested. (Due April 24, 2002)
	Apr 23 2002	Brief of respondents Barry E. Black, Richard Elliot, Jonathan O'Mara in opposition filed.
	May 7 2002	REDISTRIBUTED for Conference of May 23, 2002
	May 7 2002	Reply brief of petitioner Virginia filed.
	May 28 2002	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	May 28 2002	Petition GRANTED. SET FOR ARGUMENT December 11, 2002. **********
	Jun 21 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 9,2002.
	Jul 17 2002	Motion of respondent Barry E. Black, Richard J. Elliott, and Jonathan O'Mara for divided argument filed.
	Aug 9 2002	Brief amicus curiae of United States filed.
	Aug 9 2002	Joint appendix filed.
	Aug 9 2002	Brief of petitioner Virginia filed.
	Aug 9 2002	Brief amicus curiae of California filed.
	Aug 9 2002	Brief amici curiae of Anti-Defamation League, et al. filed.
	Aug 9 2002	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Aug 9 2002	Brief amici curiae of New Jersey, et al. filed.
	Sep 6 2002	Brief of respondents Barry E. Black, Jonathan O'Mara, and Richard J. Elliott filed.
	Sep 9 2002	Brief amicus curiae of Council of Conservative Citizens filed.
	Sep 9 2002	Brief amicus curiae of Rutherford Institute filed.
	Sep 9 2002	Brief amicus curiae of Thomas Jefferson Center for Protection of Free Expression filed.
	Sep 18 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 7 2002	Motion of respondent Barry E. Black, Richard J. Elliott, and Jonathan O'Mara for divided argument DENIED.
	Oct 7 2002	Motion of the Solicitor General for leave to participate

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No. 01-1107-CSY

Entry	Date	Proceedings and Orders
		in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 9 2002	Reply brief of petitioner Virginia filed.
	Oct 24 2002	Record filed.
	Nov 1 2002	CIRCULATED.
	Dec 11 2002	ARGUED.

Supreme Court, U.S.
FILED
011107 JAN 24 2002
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTION PRESENTED

Does the Virginia statute that bans cross burning with intent to intimidate violate the First Amendment, even though the statute reaches *all* such intimidation and is not limited to any racial, religious or other content-focused category?

LIST OF PARTIES

The petitioner is the Commonwealth of Virginia. The respondents are Barry Elton Black, Richard J. Elliott and Jonathan O'Mara, each of whom was convicted under Va. Code § 18.2-423, which prohibits cross burning with intent to intimidate.

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Virginia respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Supreme Court of Virginia, which held that the First Amendment is violated by the Virginia statute prohibiting cross burning with "the intent of intimidating any person."

OPINIONS BELOW

The Supreme Court of Virginia held that Virginia Code § 18.2-423 – which bans cross burning with the intent to intimidate – is unconstitutional, and thus reversed the convictions of three defendants. This decision is published as *Black, et al. v. Commonwealth of Virginia*, 262 Va. 764, 553 S.E.2d 738 (2001), and is reprinted in the Appendix at App. 1. The opinion of the Court of Appeals of Virginia affirming the convictions of two defendants, Jonathan O'Mara and Richard J. Elliott, is published as *O'Mara, et al. v. Commonwealth of Virginia*, 33 Va. App. 525, 535 S.E.2d 175 (2000). It is reprinted at App. 47. The unpublished *per curiam* order of the Court of Appeals of Virginia affirming the conviction of the third defendant, Barry Elton Black, is reprinted at App. 46. The letter opinion of the Circuit Court of Carroll County overruling Black's motion to dismiss the indictment is reprinted at App. 61. The record of the ruling whereby the Circuit Court of the City of Virginia Beach overruled Elliott's and O'Mara's motions to dismiss the indictments is reprinted at App. 79. *See also* App. 74.

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on November 2, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech. . . . " The Fourteenth Amendment provides that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

Virginia Code § 18.2-423 states:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

STATEMENT OF THE CASE

For nearly a half-century, the Commonwealth of Virginia has banned the fear-inspiring practice of cross burning. Enacted in 1952, the statute at issue – Va. Code § 18.2-423 – was a well-advised response to domestic

terrorism by the Ku Klux Klan.[1] Yet, the statute is not limited to that group, nor to those whose acts of intimidation spring from similar racial or religious bigotry. Instead, the statute bans cross burning by *anyone* whose intent is to intimidate *anyone* for *any reason*.

The case at bar involves a consolidated appeal arising out of three separate convictions for violating the cross burning statute. Two of the convictions involved co-defendants in a 1998 act of cross burning in Virginia Beach. The third conviction involved a separate cross burning incident in 1998 in Carroll County, part of rural Southwest Virginia. The facts of each case are as follows:

Virginia Beach – May 2, 1998: There is no evidence that Richard J. Elliott and Jonathan O'Mara are members of the Klan. The record does not show that they hold any particular views on politics or race or any other subject. They tried to burn a cross in the yard of Elliott's next door neighbor, James S. Jubilee, simply because they wanted to "get back" at Jubilee by intimidating him and his family.

An African-American and native Virginian, Jubilee had recently moved back to the Commonwealth from California, along with his wife and two sons. Elliott J.A. 52, 93.[2] The family had lived in their new neighborhood for about four months when, on May 2, 1998, Jubilee asked Elliott's mother about "some shooting" that was

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[1] The Virginia Supreme Court took notice of the public history of the times in which the cross burning statute was originally enacted, citing a series of nine newspaper articles appearing between 1949 and 1952. Copies of these articles are reproduced at App. 86-101.

[2] "Elliott J.A." refers to the Joint Appendix filed in the Virginia Supreme Court in the *Elliott* case.

going on in the rear of the Elliott home. Mrs. Elliott explained that her son had a firing range where he shot firearms as a hobby. *Id.* at 86. The conversation was cordial. *Id.* at 54. Even so, Jubilee's inquiry so angered Elliott and O'Mara that – after drinking a lot of beer – they hatched a plan to burn a cross that night in Jubilee's yard. They were joined in this endeavor by a seventeen year-old friend, David Targee.

Late that night, the three of them rode onto Jubilee's land in a pick-up truck, planted their makeshift cross, set it on fire and fled. Jubilee awoke the next morning – a Sunday – to find the partially burned cross stuck in the ground less than 20 feet from his house. *Id.* at 55. Initially furious, Jubilee soon became worried and very nervous about the incident. He was concerned about what might come next, and saw the burnt cross as "just the first round." *Id.* at 55, 57-58. Jubilee called the police.

After an investigation, Elliott and O'Mara were identified as perpetrators. The pair were indicted for attempting to burn a cross with intent to intimidate, in violation of Va. Code § 18.2-423.[3] Before trial, both defendants moved to dismiss the indictments based on their claim that the cross burning statute is unconstitutional. Heard in a consolidated hearing, both motions were denied by the trial court:

> The defendants maintain that as a content-based regulation of speech . . . the statute violates the First and Fourteenth Amendments . . . and have moved to dismiss the case . . . [T]he court is going to overrule the defendants' motions. . . .

Transcript of Hearing, Jan. 20, 1999, App. 79-80.

[3] The third perpetrator, David Targee, was also charged and became the key witness for the prosecution. *See* Elliott J.A. 67-106. His case was handled in juvenile and domestic relations district court and is not addressed in the decision that is the subject of this petition.

Tried by a jury in February of 1999, Elliott was convicted of attempted cross burning. App. 71-72. On May 6, 1999, the circuit court sentenced Elliott to 90 days in jail and fined him $2,500, in accordance with the jury's verdict. App. 69-70. Elliott then appealed.

Meanwhile, after losing his motion to dismiss, O'Mara entered a conditional guilty plea under Va. Code § 19.2-254, thereby preserving his constitutional objection. On April 26, 1999, the circuit court imposed on O'Mara a sentence of 90 days in jail and a fine of $2,500. Half of the jail time and $1,000 of the fine were suspended. App. 77-78. O'Mara then appealed.

With their cases consolidated on appeal, "both O'Mara and Elliott . . . maintain[ed] . . . 'that the code section [§ 18.2-423] is unconstitutional as violative of the free speech and expression protections' guaranteed by both the United States and Virginia Constitutions." App. 48. The Virginia Court of Appeals disagreed:

> We, therefore, conclude that Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets *only* expressive conduct undertaken with the *intent to intimidate* another, conduct clearly proscribable both as *fighting words* and a *threat of violence*. The statute *does not discriminate* in its

prohibition and is neither overbroad nor underinclusive.

Accordingly, we affirm the convictions.

App. 57 (emphasis added). Elliott and O'Mara then appealed to the Virginia Supreme Court, which consolidated their cases with the appeal of the third cross burning defendant, whose case will now be discussed.

Carroll County – August 22, 1998: Unlike the other two defendants, Barry Elton Black is a Klansman. A leader in the Klan, Black headed a rally and cross burning in Carroll County, Virginia, on the evening of August 22, 1998. Black J.A. 128.[4] This incident took place on private property with the permission of the owner – but in public view, a fact the decision below does not note. While a part of the property could not be seen from the roadside, this was not the spot chosen for erecting the cross. Instead, it was erected and burned where passers-by could clearly observe it. Standing 25 to 30 feet tall, the burning cross was visible along a three-quarter mile stretch of state roadway, where cars passed at the rate of about 40 to 50 per hour. *Id.* at 124, 125, 156, 157. The reaction of one black family driving along the road was noted by a deputy sheriff. They "stopped and looked across the field" toward the burning cross, then "took off at a higher than normal rate of speed." *Id.* at 156, 157.

The burning cross was also in view of 8 to 10 houses, including the home of Rebecca Sechrist. *Id.* at 125. She heard Klan speakers "talk real bad about the blacks and the Mexicans." *Id.* at 176. "One guy got up and said he would love to take a .30/.30 and just random[ly] shoot

[4] "Black J.A." refers to the Joint Appendix filed in the Virginia Supreme Court in the *Black* case.

the blacks. . . . " *Id.* at 176. So intimidating was the scene that Mrs. Sechrist – who is neither black nor Hispanic – "sat there and . . . cried," scared that the Klan might burn her home. *Id.* at 178, 181.

Admitting his responsibility for the cross burning, Black was arrested by the county sheriff and a deputy for violating Va. Code § 18.2-423. En route to jail with the deputy, Black volunteered his complaint about "blacks and Mexicans . . . walking up and down the sidewalk with white women holding hands and taking all the jobs," and he asked "when is the white man going to stand up to the blacks and Mexicans in this area?" *Id.* at 155.

Black defended against the charge by challenging the constitutionality of the statute, moving to dismiss his indictment on the theory that the statute violates the First Amendment of the United States Constitution and Article I, § 12 of the Virginia Constitution.[5] In a letter opinion, the trial court rejected Black's arguments, saying:

> This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused *actually intended to intimidate others* by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and . . . the Virginia Constitution.
>
> * * *

[5] Black's motion argued, *inter alia*, that § 18.2-423 discriminates on the basis of content and viewpoint, that its prima facie evidence standard creates an unconstitutional presumption, and that it is vague and overbroad. App. 62.

> Accordingly, the defendant's Motion to Dismiss is denied.

App. 64 (emphasis added).

Black was tried before a jury, who convicted him of the offense charged. He was fined $2,500, and appealed. App. 58-60. The Virginia Court of Appeals also rejected Black's free speech claims. Having already decided the Virginia Beach case a few weeks earlier, the Court of Appeals issued a one sentence opinion, affirming the judgment of the trial court "for the reasons stated in *O'Mara v. Commonwealth*." App. 46.[6] Black again appealed.

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[6] The issues raised by Black and rejected by the Virginia Court of Appeals were:

1. Does Virginia's cross burning statute, promulgated by section 18.2-423 of the Code of Virginia, engage in viewpoint discrimination in violation of the First Amendment to the United States Constitution?
2. Does Virginia's cross burning statute, promulgated by section 18.2-423 of the Code of Virginia, violate the First Amendment by failing to incorporate the standard imposed by the Supreme Court of the United States in *Brandenburg v. Ohio*, holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action?"
3. Does the provision in Virginia's cross burning statute, promulgated by section 18.2-423 of the Code of Virginia, stating that the "burning of a cross shall be prima facie evidence of an intent to intimate a person or group of persons" and permitting a jury to draw inferences of an intent to intimidate from the mere fact of cross burning alone, violate the First Amendment?

Black v. Commonwealth, Opening Brief of Appellant, p.1.

The Virginia Supreme Court consolidated Black's appeal with the appeals filed by the Virginia Beach defendants, Elliott and O'Mara. Taking up the free speech issues raised by the three defendants, the Court said:

> [W]e consider whether Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech . . . We conclude that, despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the *basis of its content*, and the statute is *overbroad*.

App. 1-2 (emphasis added). Having resolved the case based on the federal constitutional issues, the Court found it unnecessary to address the defendants' state constitutional claims. App. 18, n.9.

By a vote of 4 to 3, the Virginia high court struck down the Commonwealth's cross burning law, believing it to be "analytically indistinguishable" from the St. Paul ordinance declared unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). App. 7. The court reached his result by overlooking two substantial differences between the two laws. First, the Virginia statute includes an "intent to intimidate" element wholly lacking from the St. Paul ordinance, which dealt only with "fighting words." 505 U.S. at 380. Second, the St. Paul ordinance contained a content-based element of "race, color, creed, religion or gender" wholly missing from the Virginia statute, which bans use of a burning cross to intimidate anyone for any reason. It was these differences that led three Justices of the Virginia Supreme Court to dissent. *See* App. 36.

The Virginia Supreme Court also found fault with that part of the statute that makes the burning of a cross prima facie evidence of an intent to intimidate. This provision is simply a permissible inference. The Commonwealth still bears the burden of proving its case – including the intent element – beyond a reasonable doubt. Yet, the court believed that such a statutory inference could lead to the arrest and prosecution – albeit acquittal – of persons who had no intent to intimidate and whose speech was constitutionally protected. The court believed that such a possibility made the law unconstitutional under the overbreadth doctrine.

REASONS WHY THE WRIT SHOULD BE GRANTED

Summary

"Few things can chill free expression and association to the bone like night-riders outside the door and a fiery cross in the yard."

State v. T.B.D., 656 So.2d 479, 482 (Fla. 1995).

This case involves two important freedoms: freedom of speech and freedom from fear. In an attempt to leave the first freedom intact, while securing the second, the Virginia General Assembly long ago enacted a ban on cross burning, but *only* when accompanied by an intent to intimidate someone. The Virginia law does not limit its protection to those of a particular race, religion or background. It protects everyone. Even so, the Virginia Supreme Court has read this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), to mean that such a law constitutes unconstitutional content discrimination. Such a result exacerbates a growing conflict among state courts of last resort about what *R.A.V.* means for state

laws banning the burning of crosses. The Virginia decision is also in conflict with federal courts of appeal that have upheld anti-intimidation statutes in the context of cross burning episodes. This Court should grant *certiorari* in order to resolve these conflicts and provide guidance to the States on how they may constitutionally accommodate their fundamental interest in preserving these two freedoms.

Additionally, the Virginia decision greatly expands the overbreadth doctrine as previously recognized by this Court in its First Amendment jurisprudence. The Virginia law is not vague nor do its terms prohibit any speech that is constitutionally protected. It only prohibits cross burning when there is an intent to intimidate. Consistent with constitutional limits on the use of statutory inferences, the Virginia law also allows – but does not require – a jury to infer an intent to intimidate from an act of cross burning alone, and it leaves the burden of proof squarely on the prosecution. Looking not at the narrow scope of the law's prohibition – but focusing on the statutory inference – the court below concluded that the Virginia law is void for overbreadth. Its concern was that somewhere, somehow an innocent cross burner might be charged. A subsequent acquittal, the court reasoned, was not enough to avoid an unconstitutional chill. In so ruling, the court misunderstood what it means for overbreadth to be *real*, and disregarded the need for overbreadth to be *substantial*. It thus decided an important federal question in a way that conflicts with relevant decisions of this Court, and with relevant decisions by another state court of last resort. For these reasons, too, *certiorari* should be granted.

I. There Is a Conflict Among the States on the Constitutionality of Cross Burning Statutes.

Strictly speaking, symbols have no inherent meaning. Their meaning arises from the way they are employed in the society where they are found. Burning crosses were once used in Scotland as signal fires. *See In re Steven S.*, 31 Cal. Rptr. 2d 644, 646 (Cal. App. 1994). Early in the last century, the Ku Klux Klan adopted the practice of cross burning as a tactic of terrorism. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). Today, the practice is no longer limited to the Klan, as shown by the incident involving Elliott and O'Mara.

Today, a burning cross – standing alone and without explanation – is typically understood in our society as a message of intimidation. This is so regardless of the race, religion or other characteristics of the individual targeted. A white, middle-class Protestant waking up at night to find a burning cross in the street outside his home will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police.

So harmful – and so persistent – is the practice of cross burning that, over the years, a number of States have enacted statutes that ban it in one form or another. The question of *how* States may ban cross burning – when the intent is to intimidate – is an important question of federal law that this Court should address. Some guidance was given ten years ago in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the Court struck down an

ordinance of St. Paul, Minnesota. The ordinance criminalized the placing of a symbol, including a burning cross, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. The Court described this language as "content-based discrimination," and held the ordinance to be "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 381, 393.

In the wake of *R.A.V.*, laws prohibiting cross burning have been challenged in several States. As detailed below, the results are in conflict. In three States – South Carolina, Maryland and New Jersey – the statutes were struck down in the belief that *R.A.V.* dictated such a result. In other three States – Florida, Washington and California – the statutes were upheld, based on perceived distinctions with *R.A.V.*, including three *R.A.V.* authorized exceptions.

With the decision below, the Virginia Supreme Court has joined the first group of courts, holding the Virginia statute to be "analytically indistinguishable" from the St. Paul ordinance. The court reached this result despite two major differences between the two laws. The Virginia statute includes an "intent to intimidate" element not found in the St. Paul ordinance. Moreover, the Virginia statute bans cross burning to intimidate *anyone* for *any* reason, and thus lacks the content-based element of "race, color, creed, religion or gender" that this Court found problematic in *R.A.V.* These differences between the Virginia law and the one invalidated in *R.A.V.* make this petition a good vehicle for resolving the conflict and providing additional guidance in this important area of constitutional law.

A. States Upholding Cross Burning Laws.

The decision by the Virginia Supreme Court conflicts with decisions in three States upholding cross burning laws.

1. Florida: The Florida Supreme Court upheld that State's cross burning law in *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996). Florida's statute is limited to cross burnings on private property, but does not require an intent to intimidate.[7] The Florida defendant challenged his conviction on grounds similar to those argued by the three Virginia cross burners, claiming the Florida law was content discrimination, and invalid under *R.A.V.* In rejecting this argument, the Florida Supreme Court adopted the same rationale unsuccessfully argued by the Commonwealth in defense of the Virginia law:

> The present statute comports with R.A.V. because the Florida prohibition is "not limited to [any] favored topics," but rather cuts across the board evenly. No mention is made of any special topic such as race, color, creed, religion or gender.

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[7] Section 876.18, Fla. Stat. (1993) provides:

> Placing burning or flaming cross on property of another. – It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree. . . .

* * *

> The statute is a legitimate legislative attempt to protect Floridians of every stripe from a particularly reprehensible form of tyranny. The statute plays no favorites – it protects equally the Baptist, Catholic, Jew, Muslim; the Communist, Bircher, Democrat, Nazi, Republican, Socialist; the African-American, Caucasian, Haitian, Hispanic, native American, Vietnamese; the heterosexual, the male homosexual, the lesbian; the established politician, the neophyte, the activist; the author, the editor, the publisher; the artist, the curator; the teacher, the school administrator; the union organizer, the plant owner.
>
> 656 So. 2d 481, 482.

The conflict between the results in Florida and Virginia could hardly be more dramatic. Indeed, the Virginia requirement that there be an "intent to intimidate" – an element wholly missing from Florida's statute – reinforces the constitutionality of the Virginia law. If the Florida law does not run afoul of *R.A.V.*, then *a fortiori* the Virginia law is not invalid under *R.A.V.* either. This Court should grant the petition in order to resolve the conflict.

2. Washington: In *State v. Talley*, 858 P.2d 217 (Wash. 1993), the Supreme Court of Washington rejected a *R.A.V.*-based challenge to a statute that prohibited various acts, including cross burning, with "intent to intimidate or harass another person" because of that person's "race, color, religion, ancestry, national origin, or mental,

physical or sensory handicap."[8] The court found that the Washington ordinance qualified for all three exceptions to the prohibition against content discrimination, as announced in *R.A.V.* by Justice Scalia. If these exceptions save the Washington statute, they should also save the Virginia law.

a. The first *R.A.V.* exception is where the "basis for the content discrimination consists of the *very reason* the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 387 (emphasis added). The Washington court found that the law at issue qualified for this exception on

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[8] The Washington statute provided:

> (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:
>
> (b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning. . . . However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or

RCW 9A.36.080(1).

Subsection (2) of the same statute, which made cross burning a *per se* violation, was struck down by the Washington court as overly broad. 858 P.2d at 230. The Virginia law is not a *per se* statute, but requires an intent to intimidate.

the theory that those who "target a crime victim because of that victim's protected status" cause more harm than those who engage in the same conduct without such "special animus." 858 P.2d at 207. If the first *R.A.V.* exception permits a law to protect persons from intimidation based on *selected categories* – race, color, religion, handicap, etc. – then surely the Virginia law, which protects *everyone* from intimidation, must also be allowed.[9] The textual neutrality of the Virginia law is important. Yet, even if this neutrality were somehow disregarded and the law viewed as guarding against "special animus" toward minorities, the Virginia law would still be constitutional under *Talley*, a result in conflict with the decision below.

b. The second *R.A.V.* exception is where the subclass of proscribable speech "happens to be associated with particular *secondary effects* of the speech, so that the regulation is justified without reference to the content of the . . . speech." *R.A.V.*, 505 U.S. at 389 (citations and internal quotation marks omitted) (emphasis added). The Washington court said that, unlike the St. Paul ordinance, the Washington law is not concerned with "the listener's reactions to speech" but with "the additional harm to the victim of a hate crime and that crime's effect on society as a whole." 858 P.2d at 208. The court reasoned that such consequences qualify as "secondary effects" that bring the Washington law within the scope of the second *R.A.V.* exception.

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[9] In the trial of Black, the Commonwealth conceded that the definition of "with the intent to intimidate," as used in this statute, means "a motivation to intentionally put a person or group of persons in fear of bodily harm." The jury was so instructed. App. 66-67.

If the second *R.A.V.* exception finds a secondary effect in the impact of hate crime on society as a whole, then surely there is also a secondary effect when society sees crosses burned with an intent to intimidate. Such incidents are historically associated not with threatened fisticuffs or other minor assault, but are a form of domestic terrorism associated with threats to burn, lynch, behead, or otherwise murder innocent victims. Indeed, in the old newspaper articles cited by the Virginia Supreme Court, it is clear that cross burning was not banned because the Commonwealth wanted to suppress free expression, as the Virginia court erroneously concluded. App. 12. Instead, it was banned because cross burning was understood to be a terrorist act. *See, e.g.* App. 89, 100. The bill to ban such terrorism was presented to the House of Delegates by a former FBI agent, Delegate Mills E. Godwin, Jr., who later became twice Governor of Virginia. A newspaper reported the purpose of the measure: "Godwin said law and order in the State were impossible if organized groups could create fear by intimidation." App. 100-01. The breakdown of law and order which Virginia sought to avoid should surely qualify as a secondary effect, and a legitimate objective of legislation banning the burning of crosses.

c. The third *R.A.V.* exception applies where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. 390. The Washington court also said the statute there qualified for this exception because it expressly protected "discriminatory ideas and philosophies when they are not combined with criminal acts." 858 P.2d at 209. If the third *R.A.V.* exception is thus met, then it must also be met by the language of the Virginia

law, which cannot be construed as reaching *anything* other than criminal acts of intimidation.

In sum, the Washington decision that the cross burning statute of that State qualifies for these three *R.A.V.* exceptions conflicts with the decision below to strike down the Virginia law under *R.A.V.* This conflict should be resolved through *certiorari*.

3. California: The conflict among the States is further illustrated by a California decision rejecting a *R.A.V.*-based challenge to that State's cross burning law. *In re Steven S.*, 31 Cal Rptr. 2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994). The California law criminalized the burning of a cross or other known religious symbol, on the property of another, without permission, for the purpose of terrorizing the owner or occupant, or with reckless disregard of the risk of doing so.[10] The court first held that the statute did not prohibit constitutionally protected conduct because it was aimed at threats, and threats are outside the First Amendment. 31 Cal. Rptr. 2d at 647-48. It then rejected a claim that the law was content-discriminatory in violation of *R.A.V.*, finding that the statute in question came within all three

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[10] Section 11411(c) of the California Penal Code provides, in relevant part:

> Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, . . . shall be punished [as a felony or misdemeanor].

Section 11411(d) defines "terrorize" as "to cause a person of ordinary emotions and sensibilities to fear for personal safety."

of the exceptions to the content-discrimination doctrine announced in *R.A.V.*

B. States Striking Down Cross Burning Laws.

The appropriateness of certiorari is enhanced by the fact that Virginia is not the only State in conflict with Florida, Washington and California. As the implementation of *R.A.V.* has percolated through the States, three other state supreme courts – South Carolina, Maryland and New Jersey – have struck down cross burning laws. The issue of how *R.A.V.* should be applied is ripe for consideration by this Court.

1. South Carolina: *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), involved a defendant convicted of burning a cross on the property of another and intimidation by use of an incendiary.[11] The South Carolina Supreme Court

[11] The South Carolina cross burning law provided:

> It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

S.C. Code Ann. 16-7-120 (1985).

Additionally, S.C. Code Ann. 16-11-550 (1985) provided, in pertinent part: "Whoever willfully and unlawfully communicates a threat . . . concerning an attempt . . . to . . . intimidate any individual . . . by means of an explosive or incendiary . . . shall be guilty of a felony . . . "

upheld his convictions. A few days later, this Court decided *R.A.V.*, and the defendant sought re-hearing. The court then concluded that *R.A.V.* made the cross burning statute unconstitutional. It also concluded that, in order to save the intimidation statute from unconstitutionality, it was necessary to re-interpret the term "incendiary" so as to exclude a burning cross. Both convictions were vacated.

2. Maryland: A Maryland statute outlawed the burning of crosses and other religious symbols without obtaining permission from the owner of the premises and notifying the fire department. The law did not require an intent to intimidate. *See* Md. Code (1957) Art. 27, § 10A.[12] Two convicted cross burners challenged the law as unconstitutional. One had burned a cross on the property of a black family. The other had burned a cross on State-owned property. Neither had obtained permission nor given the required notice. *State v. Sheldon*, 629 A.2d 753, 755-56 (1993). The Maryland Supreme Court rejected the State's argument that it has "a compelling interest in

[12] Maryland Code (1957) Art. 27, § 10A, provided:

> It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place. Any person or persons who violates the provisions of this section shall, upon conviction, be deemed guilty of a felony and shall suffer punishment for a period not to exceed 3 years or shall be fined an amount not to exceed $5,000 or shall suffer both such fine and imprisonment in the discretion of the court.

protecting the community against bias-motivated threats to public safety and order." *Id.* at 759. It also rejected the claim that the law was a fire safety measure. *Id.* at 759. Instead, the court struck the statute down as content-based discrimination, holding that "the cross burning statute does not fall within any of the *R.A.V.* exceptions. . . . " *Id.* at 762.

3. **New Jersey:** In *State v. Vawter*, 642 A.2d 349 (N.J. 1994), the Supreme Court of New Jersey struck down a statute that prohibited "purposefully, knowingly or recklessly" putting another in "fear of bodily violence" through symbols that expose others to "threats of violence, contempt or hatred on the basis of race, color, creed or religion." Specifically listed among such symbols were "a burning cross or Nazi swastika." N.J.S.A. 2C:33-10.[13] Notwithstanding the *mens rea* and "fear of bodily violence" requirements, the court concluded that the law was a "content-based restriction" rendered unconstitutional by the decision in *R.A.V. Id.* at 357, 358.

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[13] The New Jersey statute read in full:

> A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to[,] a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

N.J.S.A. 2C:33-10.

In sum, three States have read *R.A.V.* to allow their cross burning statute to survive. Four States – including Virginia – have read *R.A.V.* to invalidate their statutes. The difference in outcome cannot be explained by difference in statutory texts, but reflects fundamentally different understandings of what *R.A.V.* means. The conflict is mature and should now be resolved through *certiorari*.

II. There is a Conflict Between Virginia and Federal Circuits On the Constitutionality of Anti-Intimidation Statutes Applied in the Context of Cross burning.

The conflict in how to apply *R.A.V.* does not just exist among States. There is also a conflict between Virginia and two federal circuits – the Eighth and Seventh. After this Court's decision in *R.A.V.*, the United States Attorney for the District of Minnesota brought federal civil rights charges against the young cross burner who prevailed there, along with two juvenile co-defendants. The basis of the charges was the same cross burning spree that led to the state law prosecutions in *R.A.V.* Of particular note was the new federal charge brought under 42 U.S.C. § 3631, which provides:

> Whoever . . . by force or threat of force willfully injuries [sic], intimidates or interferes with, or attempts to injure, intimidate or interfere with –
>
> (a) any person because of his race, color, religion, sex, handicap . . . familial status . . . or national origin and because he is . . . occupying . . . any dwelling . . .
>
> [shall be guilty of an offense against the United States] . . .

The defendants were convicted and appealed to the Eighth Circuit, claiming that the convictions could not stand because the expressive act of cross burning is protected speech under the decision in *R.A.V.* The Eighth Circuit rejected the argument and upheld the convictions. *United States v. J.H.H., et al.*, 22 F.3d 821 (8th Cir. 1994). In so doing, the court held that, even if the statutes at issue made content distinctions, they came within the third *R.A.V.* exception, because "they are of a kind that poses 'no significant danger of idea or viewpoint discrimination.' " *Id.*, quoting *R.A.V.*, 505 U.S. at 388. This conclusion echoes the result reached earlier by the Supreme Court of Washington in *Talley*, an opinion whose conflict with the case at bar has already been discussed. *See supra* at 15.

Additionally, the Eighth Circuit expressly drew a distinction between cross burning "done with the specific intent to intimidate" and cross burning "done for the sole purpose of making a political statement." *Id.* at 826. The court held that the former sort of cross burning could be prohibited, but not the latter. By definition, the Virginia statute *only* prohibits cross burning when there is a specific intent to intimidate, and thus meets the post-*R.A.V.* standard in the Eighth Circuit. By striking down the Virginia law, the Virginia Supreme Court has created a conflict with a federal court of appeals on an important issue of constitutional law.

There is also a conflict between Virginia and the Seventh Circuit. In *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993), charges were brought against another pair of cross burners for violating 42 U.S.C. § 3631. The comments of the court are telling:

> [T]he evidence showed that the defendants burned the crosses to tell those in the Jones household (and no doubt to anyone else who saw the burning crosses) that black people were unwelcome in Keeneyville and that association with blacks was not approved.
>
> * * *
>
> No doubt, the defendants wanted to express their dislike, even hatred, of blacks through the cross burnings. *But the act of cross burning also promotes fear, intimidation, and psychological injury.* Therein lies the reason cross burning, as done in this case, lacks First Amendment protection.

6 F.3d at 1250 (emphasis added). The Seventh Circuit – like the Eighth – found that cross burning for the purpose of *intimidation* can be prosecuted, even under a statute that includes the same sort of content-based categories – race, color, religion, sex, handicap, familial status and national origin – that were problematic in *R.A.V.* The Virginia statute has no such categories. It applies whenever anyone burns a cross to intimidate *anyone* for *any* reason. If Virginia Supreme Court was correct in striking down such a content-neutral statute, then *a fortiori* the Seventh and Eighth Circuits must have erred in upholding content-based prohibitions on intimidation. Conversely, if these federal circuits were correct, then it was the Virginia court that erred. There is a major conflict here, which this Court should resolve.

III. The Decision that the Virginia Law is "Overbroad" is Contrary to the Overbreadth Doctrine of this Court, and Creates a Conflict Among the States.

The Virginia Supreme Court also ruled that the cross burning statute is void under the overbreadth doctrine, citing Justice White's concurrence in *R.A.V.* App. 16. The court misread what Justice White had to say.[14] Indeed, what the opinion below calls "overbreadth" bears little resemblance to the overbreadth doctrine as explained by this Court, or as applied by Justice White in *R.A.V.* As a result, there is a conflict between state high courts on overbreadth challenges to cross burning bans. Certiorari should be granted in order to correct the Virginia Supreme Court's failure to follow the precedents of this Court, and to resolve the resulting conflict among States.

It may be helpful to begin by reviewing what the overbreadth doctrine means. Under traditional rules of standing, "constitutional rights are personal and may not be asserted vicariously." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Similarly, a person whose conduct may be constitutionally prohibited by statute, is unable to challenge the statute on the grounds that the same statute might be applied unconstitutionally to someone else whose conduct is not before the court. *Id.* The overbreadth doctrine alters these traditional rules of standing. In the area of the First Amendment, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or

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[14] Justice White was joined by Justices Blackmun and O'Connor, and was joined in part by Justice Stevens.

expression." *Id.* at 612. In other words, where the statute in question might chill speech protected by the First Amendment, those who are before the court have standing to challenge the statute on its face, even if their own conduct is not so protected.

There is more. The overbreadth doctrine contains not just a rule of standing, but also a rule of decision-making. Not every case of overbreadth is fatal. As the *Broadrick* court explained, overbreadth analysis is "strong medicine" and should be applied "sparingly and only as a last resort." *Id.* at 13. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 614. On both of these issues – whether overbreadth is real and whether it is substantial – the Virginia Supreme Court made decisions about overbreadth that merit review by this Court.

Under this Court's precedents, in order for there to be real overbreadth, the statute's *prohibitory terms* must be so broad – or so vague – as to forbid expression that is constitutionally protected. *See e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972) (holding that statute is overbroad "if in its reach it prohibits constitutionally protected conduct.") But, the Virginia cross burning statute contains no such flaw. By its terms, the law only bans cross burning when there is an intent to intimidate someone. There are *no* circumstances where such intimidation is constitutionally protected, and the court below did not suggest otherwise.

Instead of looking at the prohibitory terms, the court focused on the statutory inference, which allows a jury to infer an intent to intimidate, based on the act of cross

burning alone. The court did not doubt that the prosecutor still must prove every element of the offense – including intent – beyond a reasonable doubt.[15] What concerned the court was the possibility that an *innocent* cross burner – *i.e.* one who burns a cross *without* an intent to intimidate – might still be arrested and prosecuted. The conduct of such a person is not barred by the statute; yet the court thought the prospect of a trial might chill innocent expression. The possibility that someone who has not violated a statute might be mistakenly charged is inherent in law enforcement and is not what the overbreadth doctrine has heretofore sought to address. Thus, the decision below represents a novel reading of what real overbreadth means.[16] At best, it is an expansion of

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[15] The juries in both *Black* and *Elliott* were so instructed. App. 66, 75-76. In *Black*, the jury was also instructed that it might find such intention from the act of burning the cross in public. App. 67. Moreover, the test for the constitutionality of statutory inferences is (i) whether the state retains the burden of proof on the fact to be presumed, and (ii) whether "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Barnes v. United States*, 412 U.S. 837, 843 (1973). The inference in the Virginia cross burning statute clearly meets this test, and the decision below does not suggest otherwise.

[16] In its overbreadth discussion, the Virginia Supreme Court cites the concurring opinion of Justice White in *R.A.V.*, as well as decisions in three other cases: *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2nd Cir. 2000). *See* App. 16. Yet, each of these cases involved overbreadth in the conventional sense of a statute which *by its terms* bans protected speech. *None* involved the concern about potentially erroneous arrests that the court wishes to add to the overbreadth doctrine.

the doctrine and, thus, presents an important federal issue on which this Court ought to rule. At worst, it is a failure to abide by the precedents of this Court, which ought to be corrected. In either case, the issue merits *certiorari*.

The Virginia Supreme Court also decided – albeit implicitly – that the number of innocent cross burners chilled is *substantial* in relation to the number who burn crosses with an intent to intimidate. Such a conclusion is implausible and unsupported by any analysis in the opinion below. Moreover, it is in conflict with the decision of the Florida Supreme Court, which rejected an overbreadth challenge to the cross burning law of that State: "Although one might be able to imagine a hypothetical situation wherein the statute could be impermissibly applied, the threat of overbreadth is speculative at best and is insufficiently substantial to invalidate the statute on its face." *State v. T.B.D.*, 656 So.2d at 482.[17] The Virginia statute is even narrower than its Florida counterpart. While the Florida law applies only to cross burnings on the land of another – and not on highways and other public places – it lacks the critical "intent to intimidate" element that confines the reach of the Virginia law. To say the Virginia law is overbroad, but the Florida law is not, constitutes a conflict that should be resolved by *certiorari*.

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[17] *See also In re Steven S.*, where the California Court of Appeal reached a similar result, 31 Cal. Rptr. 2d 644 (1994), and the Supreme Court of California denied review. 1994 Cal. LEXIS 5185 (Sept. 22, 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

COMMONWEALTH OF VIRGINIA

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January 24, 2002

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[IN THE SUPREME COURT OF VIRGINIA]

Present: Carrico, C.J., Lacy, Hassell, Koontz, Kinser, and Lemons, JJ., and Whiting, S.J.*

BARRY ELTON BLACK

v. Record No. 010123

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 003014

COMMONWEALTH OF VIRGINIA

JONATHAN O'MARA

v. Record No. 010038

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE DONALD W. LEMONS
November 2, 2001

FROM THE COURT OF APPEALS OF VIRGINIA

In these appeals, we consider whether Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech. The case of *Black v. Commonwealth* involves a Ku Klux Klan rally on private property with the permission of the owner, where a cross was burned as a part of the ceremony. The companion cases of *O'Mara v. Commonwealth* and *Elliott v. Commonwealth* involve the attempted

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* Justice Keenan did not participate in the hearing and decision of this case.

burning of a cross in the backyard of the home of James S. Jubilee ("Jubilee"), an African-American, without permission. We conclude that, despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad.

FACTS AND PROCEEDINGS BELOW

The prosecutions of Richard J. Elliott ("Elliott") and Jonathan O'Mara ("O'Mara") arose from a single incident in the City of Virginia Beach. On May 2, 1998, Elliott and O'Mara attended a party at the home of David Targee ("Targee"). Elliott told several people at the party that his neighbor, Jubilee, had complained about the discharge of firearms in Elliott's backyard. In response, Elliott suggested they burn a cross in Jubilee's yard.

Elliott, O'Mara, and Targee hastily constructed a crude wooden cross in Targee's garage. While transporting the cross to the Jubilee home, Elliott referred to Jubilee with a racial epithet confirming Jubilee's race. Upon arriving at Jubilee's home, O'Mara put the cross in the ground and attempted to light it.

In addition to the epithet, the record is replete with references to Jubilee's race. In the Commonwealth's motion for joinder of defendants in the Elliott and O'Mara cases, it is stated: "Mr. James Jubilee is an African-American." A fire investigator with the City of Virginia Beach testified that Targee knew the Jubilees were black before he participated in the cross burning.

Throughout the O'Mara and Elliott prosecution, the Commonwealth referred to "burning a cross in a black family's yard." The questions of counsel and argument to the court are replete with references to race and racism.

Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross burning statute.

Elliott was also charged with attempted cross burning and conspiracy to commit cross burning. Upon his plea of not guilty, a jury found him guilty of attempted cross burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500.

O'Mara and Elliott appealed to the Court of Appeals, alleging that the Virginia cross burning statute violated the free speech clauses of both the United States and Virginia Constitutions. The Court of Appeals affirmed the convictions, holding that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence." *O'Mara v. Commonwealth*, 33 Va. App. 525, 536, 535 S.E.2d 175, 181 (2000).

In the third case reviewed, Barry Elton Black ("Black") organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County. Following speeches filled with racial, ethnic, and religious bigotry, a cross approximately 25 to 30 feet tall was ignited.

Black was indicted for violating Virginia's cross burning statute. He moved for dismissal of the indictment on the grounds that the statute was unconstitutional. The trial court denied Black's motion and, upon conviction by a jury, Black was sentenced to pay a fine of $2500.

Black appealed his conviction, and the Court of Appeals affirmed the judgment of the trial court, "[f]or the reasons stated in *O'Mara v. Commonwealth.*" *Black v. Commonwealth,* Rec. No. 1581-99-3, December 19, 2000, at 1.

THE CROSS BURNING STATUTE

Code § 18.2-423, the cross burning statute, provides that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Black[1] contends that the cross burning statute is unconstitutional because it engages in viewpoint and

[1] Because of the similar constitutional challenges presented in these consolidated cases, our references to Black's contentions shall be inclusive of those mounted by O'Mara and Elliott.

content discrimination and it fails to incorporate the standards articulated by the United States Supreme Court in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), concerning incitement to, and likelihood of, imminent lawless action. Additionally, Black contends that the provision of the statute permitting an inference of intent to intimidate from the mere act of burning a cross, which excuses the Commonwealth from its proof requirement for the establishment of a prima facie case, further aggravates viewpoint and content discrimination and violates the limitations prescribed in *Brandenburg.*

The geometric configuration of a single vertical bar traversed by a single shorter horizontal bar has no unusual inherent properties. But its symbolic meaning is powerful. For Christians, the symbol of the cross evokes remembrance of the crucifixion of Christ. Unfortunately, such powerful symbols are often subject to misappropriation. As recognized by Justice Clarence Thomas in his concurring opinion in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753 (1995), the burning of a cross has acquired a specific meaning:

> There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning. . . . The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

In 1952, in direct response to Ku Klux Klan activities in Virginia,[2] including incidents of cross burning, the General Assembly enacted the predecessor statute to the law at issue in these cases.[3] The cross burning statute was amended on several occasions, including an amendment expanding the sites where cross burning may not take place, and the addition of the inference of intent to intimidate from the mere act of burning a cross for the purposes of establishing a prima facie case under the statute.[4]

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[2] *See Police Aid Requested by Teacher: Cross is Burned in Negro's Yard*, Richmond News Leader, Jan. 21, 1949, at 19; *Cross Fired Near Suffolk Stirs Probe: Burning Second in Past Week*, Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1; *Huge Cross is Burned on Hill Just South of Covington*, Richmond Times-Dispatch, Apr. 14, 1950, at 6; *Cross Burned at Manakin; Third in Area*, Richmond Times-Dispatch, Feb. 26, 1951, at 4; *Cross is Burned at Reedville Home*, Richmond News Leader, Apr. 14, 1951, at 1; *'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments*, Richmond Times-Dispatch, Feb. 6, 1952, at 7; *Bill to Curb KKK Passed by the House*, Richmond Times-Dispatch, Mar. 8, 1952, at 5; *Name Rider Approved by House: Measure Now Goes to Battle*, Richmond News Leader, Feb. 23, 1952, at 1; *Governor Backs Curb on Ku Klux Activities*, Richmond Times-Dispatch, Feb. 10, 1952, § 2, at 1.

[3] Code § 18.1-365 stated in pertinent part:

It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the Commonwealth of Virginia a burning or a flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483 § 2 at 777.

[4] *See* 1968 Va. Acts ch. 350 at 450; 1975 Va. Acts ch. 14 at 90, ch. 15 at 174.

SELECTIVE REGULATION OF SPEECH BASED UPON CONTENT

It is well established that non-verbal, symbolic expression is "speech," and is as fully protected by the First Amendment to the United States Constitution as more traditional means of communication. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing of black arm bands by high school students as a protest against the war in Vietnam). However pernicious the expression may be, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Any question about the constitutional infirmity of such selective proscription of speech was resolved by the United States Supreme Court in the case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V. R.A.V.* involved the prosecution of a teenager who, with several other minors, allegedly assembled a crudely made cross and burned the cross inside the fenced yard of a black family. *Id.* at 379. The City of St. Paul prosecuted under its Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of

> race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn., Legis. Code § 292.02 (1990). The trial court held that the statute was unconstitutional, but the Minnesota Supreme Court reversed, construing the St. Paul ordinance as limited to conduct that amounts to "fighting words," namely, "conduct that itself inflicts injury or tends to incite immediate violence. . . . " *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn.1991). Accepting the limited construction placed upon the statute by the Minnesota Supreme Court, the United States Supreme Court held that, even if the expression reached by the ordinance was proscribable under the "fighting words" doctrine, the ordinance was "facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." *R.A.V.*, 505 U.S. at 381.

Noting that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed," the Court observed that "[c]ontent-based regulations are presumptively invalid." *Id.* at 382 (citations omitted). Exceptions to the rule include: obscenity (*e.g., Roth v. United States*, 354 U.S. 476 (1957)), defamation (*e.g., Beauharnais v. Illinois*, 343 U.S. 250 (1952)), and "fighting words" (*e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). But simply because particular categories of speech may be regulated does not mean that such regulation may selectively discriminate on the basis of content. As the Court in *R.A.V.* stated:

> And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

R.A.V., 505 U.S. at 386.

The Commonwealth argues that the Virginia statute is neutral because "Code § 18.2-423 applies equally to anyone who burns a cross for the purpose of intimidating anyone." The Commonwealth further dwells upon the phrase in *R.A.V.* which states that "threats of violence are outside the First Amendment." 505 U.S. at 388. This quotation is incomplete and distorts the holding of *R.A.V.* While a statute of neutral application proscribing intimidation or threats may be permissible, a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment. *Id.*

Emphasizing the point, the Court in *R.A.V.*, noted:

> Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 384.

> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be

> punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

Id. at 386.

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* – i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.

Id. at 388.

> And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.

Id.

R.A.V. makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not

discriminate based upon the content of the message.[5] In this case, the Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message. As the Court in *R.A.V.* succinctly stated: "the government may not regulate use based upon hostility – or favoritism – towards the underlying message expressed." *Id.* at 386.

While not specifically stating that "race, color, creed, religion or gender" is the subject of proscription, the absence of such language in the Virginia statute does not

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[5] It is important to note that *R.A.V.* did not interpret the First Amendment to forbid "underinclusiveness." To the contrary, the Court held that:

> In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

Id. at 387. Of course, the subjects of the proscription expressly stated in the St. Paul ordinance were symbols and words, including a burning cross or a Nazi swastika, evoking "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." As the Court noted, excluded from proscription was identical behavior with a different subject, such as "political affiliation, union membership, or homosexuality." *Id.* at 391. The infirmity addressed in *R.A.V.*, as in the cases before this Court, was not "underinclusiveness;" rather, it was the selective discrimination in the ordinance based upon content.

mask the motivating purpose behind the statutory prohibition of cross burning. The United States Supreme Court dealt with a similar question in the "flag burning" cases. In *Texas v. Johnson*, Johnson was prosecuted under a statute making it unlawful to intentionally or knowingly desecrate the United States flag. "Desecrate" was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." 491 U.S. at 400 (quoting Texas Penal Code Ann. § 42.09 (1989)). After the Supreme Court declared the Texas statute unconstitutional, Congress enacted the Flag Protection Act of 1989. In subsequent litigation concerning the Act, the government maintained that the absence of language in the Act focusing upon the content of the actor's symbolic speech cured any constitutional problems. The Supreme Court disagreed in *United States v. Eichman*, 496 U.S. 310, 315 (1990) (internal quotations omitted), stating that, "[a]lthough the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression."

Similarly, considering the historical and current context of cross burning, and the statute's reliance on such context for the provision of an inference of intent to intimidate from the mere act of burning a cross, it is clear that the Commonwealth's interest in enacting the cross burning statute is related to the suppression of free expression as well.

The virulent symbolism of cross burning has been discussed in so many judicial opinions that its subject and

content as symbolic speech has been universally acknowledged. For example, the Supreme Court of South Carolina declared a statute[6] with operative language similar to ours unconstitutional and observed: "a burning cross historically conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993). The Court of Appeals of Maryland also declared a statute[7] with operative language similar to ours unconstitutional and observed:

> Those who openly burn crosses do so fully cognizant of the controversial racial and religious messages which such acts impart. Historically, the Ku Klux Klan burned crosses to express

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[6] S. C. Code Ann. § 16-7-120 (1985) provided:

It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483 § 2 at 777.

[7] Md. Ann. Code art.27, § 10A (1957, 1992 Repl. Vol.) provided in pertinent part:

It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place.

> hostility towards blacks and other groups it disfavored, and it is that idea which contemporary cross burners aim to perpetuate.

State v. Sheldon, 629 A.2d 753, 757 (Md. 1993).

The historical context for the passage of the Virginia cross burning statute is uncontrovertible. In an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech – the burning of a cross. It did not proscribe the burning of a circle or a square because no animating message is contained in such an act.

Initially, the cross burning proscription extended only to acts on property of another without permission. In 1968, the limitation concerning situs was removed, and in 1975, the addition of language establishing prima facie evidence of intent to intimidate from the mere act of burning a cross reaffirmed the legislative context of the statute. During oral argument, the Commonwealth maintained that the portion of the statute proscribing the burning of a cross had nothing to do with the motivation of the actor. When asked how the Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning. The Commonwealth cannot have it both ways.

"SECONDARY EFFECTS"

As described above, the *R.A.V.* analysis begins with categories of speech that may be subject to regulation and

holds that such regulation may not selectively discriminate on the basis of content. However, the Court in *R.A.V.* recognized that some selective regulation of constitutionally protected speech may be permissible if it is based upon the "secondary effects" of speech rather than its content. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the ordinance under review proscribed the location of an adult motion picture theater within 1,000 feet of any residential zone, single – or multiple – family dwelling, church, park, or school. Because the ordinance did not ban adult theaters entirely, the Court held that the ordinance is "properly analyzed as a form of time, place, and manner regulation." *Id.* at 46.

The analysis used by the Court focused upon whether the regulation was directed at the content of the protected speech or at a legitimate area of government concern. Determining that the dominant motive of the ordinance was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' " the Court upheld the ordinance. *Id.* at 48. The Court held that the regulation in *Renton* was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47. By contrast, the legislative history of the Virginia cross burning statute, the meaning afforded the expressive conduct, and the provision of prima facia evidence of intent to intimidate from the mere act of burning a cross, make it abundantly clear that Code § 18.2-423 is aimed at regulating content, not "secondary effects."

OVERBREADTH ANALYSIS

As discussed herein, the majority opinion in *R.A.V.* holds that certain categories of speech may be regulated, but the government may not discriminate in its proscription within these categories on the basis of content. The concurring opinions in *R.A.V.* preferred a more traditional analysis confined to the question whether the ordinance suffered from overbreadth. As Justice White noted, St. Paul's ordinance was unconstitutionally overbroad because:

> Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that – however repugnant – is shielded by the First Amendment.

Id. at 413 (J. White, concurring). The Commonwealth's cross burning statute is similarly defective.

It is not simply the prospect of conviction under the statute that renders it overbroad. The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad. *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 392-93 (1988). Threat of prosecution under a criminal statute "tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 710 (4th Cir. 1999). Self-censorship, "a harm that can be realized even without an active prosecution," inhibits free speech. *Vermont Right to Life Committee, Inc. v. Sorrell,* 221 F.3d 376, 382 (2nd Cir. 2000).

Code § 18.2-423 provides in part that "any such burning of a cross shall be prima facie evidence of an intent to

intimidate a person or group of persons." Assuming that the act is done "on the property of another, a highway or other public place,"[3] the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression. Code § 18.2-423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech. As such it is overbroad.

BRANDENBURG ISSUES

R.A.V., the Court acknowledged that the narrow construction placed upon the ordinance limited its application to "fighting words," a proper category of proscription. Nonetheless, the ordinance was declared unconstitutional because of its selective application to only certain expressions of fighting words. Virginia's cross burning statute suffers from the same infirmity.

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[3] The Virginia statute prohibits cross-burning "on the property of another, a highway or other public place." Remarkably, it sweeps within its prohibition the act "on the property of another" with or without permission.

Because we hold that the statute impermissibly proscribes otherwise protected speech on the basis of content, and because the statute is overbroad, it is unnecessary to address the remaining challenges under *Brandenburg*.[9]

CONCLUSION

Under our system of government, people have the right to use symbols to communicate. They may patriotically wave the flag or burn it in protest; they may reverently worship the cross or burn it as an expression of bigotry. Neutrally expressed statutes prohibiting vandalism, assault, and trespass may have vitality for the prosecution of particularly offensive conduct. While reasonable prohibitions upon time, place, and manner of speech, and statutes of neutral application may be enforced, government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed.

A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment. Additionally, a statute that sweeps within its ambit both protected and unprotected speech is overbroad. Accordingly, we hold that Code § 18.2-423 violates the First

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[9] Additionally, because we resolve these questions under the First Amendment to the United States Constitution, it is unnecessary to address Elliott's and O'Mara's additional argument that Article I, § 12 of the Virginia Constitution is also violated.

Amendment of the United States Constitution. The convictions in each of these appeals will be vacated and the indictments will be dismissed.

Reversed and dismissed.

JUSTICE KINSER, concurring.
JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

JUSTICE KINSER, concurring.

In the words of the dissent, I, too, "stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others." However, in contrast to the dissent, I cannot be dissuaded from that devotion, and believe that the "fair application of our jurisprudence" must include a fair and proper application of the First Amendment. Therefore, I fully agree with the majority opinion. I write separately to address certain inferences and conclusions drawn by the dissent.

Relying on the definition of the term "intimidation" set forth in *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 670 (1985) ("intimidation . . . means putting a victim in fear of bodily harm"), the dissent concludes that Code § 18.2-423 proscribes only conduct that constitutes "true threats." Expanding on that definition, the dissent then states that the purpose of Code § 18.2-423 is "to proscribe physical acts intended to inflict bodily harm

upon the victims of such acts." The dissent's attempt to equate an intent to intimidate with a "true threat" or a physical act intended to inflict bodily harm has no legal basis and misconstrues the decision in *Sutton*.

The issue in that case was whether there was sufficient evidence to prove that the defendant engaged in sexual intercourse with the victim against her will by intimidation. 228 Va. at 662, 324 S.E.2d at 669. Noting that the General Assembly had expanded the scope of the statute proscribing rape to include "a prohibition against sexual intercourse with a woman against her will by threat or intimidation," as well as by force, the Court explained that "[t]here is a difference between threat and intimidation[,]" and that "[i]ntimidation may occur without threats." *Id.* at 663, 324 S.E.2d at 669-70. Thus, our established jurisprudence does not support the proposition that Code § 18.2-423 proscribes only conduct that constitutes "true threats." An act performed with the intent to intimidate, i.e., to place an individual in fear of bodily harm, does not rise to the same level as a threat (defined in *Sutton* as "expression of an intention to do bodily harm," 228 Va. at 663, 324 S.E.2d at 670), or a physical act intended to inflict bodily harm.

For the same reason, Code § 18.2-423 does not satisfy the principle enunciated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Although reprehensible and offensive, the act of burning a cross with the intent to

intimidate is not necessarily speech aimed at "producing imminent lawless action." *Id.* That proposition is borne out by the fact that the cross burning for which Barry Elton Black was convicted occurred on private property with the permission of the owner.

Even if the dissent were correct that Code § 18.2-423 proscribes only conduct that constitutes "true threats," the General Assembly cannot engage in content discrimination by selectively prohibiting only those "true threats" that convey a particular message. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Unfortunately, that is what the General Assembly has done in Code § 18.2-423 by confining the proscription in that statute to the act of burning a cross. The constitutional infirmity is not, as suggested by the dissent, cured by the fact that the statute does not prohibit all acts of burning a cross. The statute's content-based discrimination still exists.

Finally, the dissent's statement that the majority has concluded that the Constitution of the United States prevents the General Assembly from enacting a statute that prohibits persons from burning a cross "in a manner that intentionally places citizens in fear of bodily harm" misinterprets the holding in the majority opinion. I believe that a more accurate characterization of the majority's conclusion is that the General Assembly may, in a statute of neutral application, proscribe expressive conduct performed with the intent to intimidate another individual, but that the General Assembly may not selectively prohibit only certain acts of intimidation based upon the content of the underlying message.

For these reasons, I respectfully concur.

JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

I dissent. The majority opinion invalidates a statute that for almost 50 years has protected our citizens from being placed in fear of bodily harm by the burning of a cross. The majority concludes that the Constitution of the United States prohibits the General Assembly from enacting this statute. I find no such prohibition in either the Constitution of Virginia or the Constitution of the United States. Without question, the framers of the First Amendment never contemplated that a court would construe that Amendment so that it would permit a person to burn a cross in a manner that intentionally places citizens in fear of bodily harm.

I am concerned about the fair application of our jurisprudence to every citizen and the proper interpretation of our Federal and State Constitutions. These same concerns for fairness and the safety of our citizens were the very basis for the General Assembly's decision to enact Code § 18.2-423 almost 50 years ago.

I stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others. However, contrary to the view adopted by the majority in these appeals, the First Amendment does not permit a person to burn a cross in a manner that intentionally places another person in fear of bodily harm.

I.

A.

Barry Elton Black was indicted by a Carroll County grand jury for the burning of a cross with the intent to intimidate in violation of Code § 18.2-423. At the conclusion of a trial, the jury found him guilty as charged in the indictment and fixed his punishment at $2,500. Black appealed the circuit court's judgment confirming the jury's verdict to the Court of Appeals, which affirmed his conviction. *Black v. Commonwealth*, Record No. 1581-99-3 (December 19, 2000).

The following evidence was presented during Black's trial. On August 22, 1998, H. Warren Manning, the Sheriff of Carroll County, received a report that members of the Ku Klux Klan intended to conduct a rally in Carroll County that evening. Later, Sheriff Manning drove his police car to the site of the rally, where three men dressed in white robes and hats approached him. Sergeant Richard C. Clark, Jr., met Sheriff Manning at the site of the rally.

Approximately 45 minutes later, after the rally started, Sheriff Manning observed the Klan members burn a cross that was approximately 25 to 30 feet tall. Sheriff Manning approached Black and inquired, "who [is] responsible for burning the cross?" Black responded that he was responsible for burning the cross, and he was placed under arrest.

The rally was conducted on property owned by Annabell Sechrist. She was present during the rally, and she had given the Ku Klux Klan permission to burn the cross on her property.

Rebecca Sechrist, a Caucasian female, lived on property adjacent to the property where the rally occurred. Sechrist observed the rally from her home. In response to the question, "[w]hat statements did you hear?", she testified: "They . . . talked a lot about blacks – and I don't call [ ] the word they called it . . . it started with an N and I don't, I don't use that word, I'm sorry – but they talked real bad about the blacks and the Mexicans and they talked about how, one . . . guy got up and said that he would love to take a . 30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and the Mexicans back from where they come from and talked about President Clinton and Hillary Clinton and about the government funding money for the, for the people that can't afford housing and stuff and . . . how their tax paying goes to keep the black people up and stuff like that."

Sechrist testified that she was "scared" as a result of the rally. She stated: "I was scared our home would get burned or something would happen to it. We've got two . . . kids and I was afraid that something would happen to them." In response to a question by defendant's counsel, Sechrist testified: "I think they were trying to scare me."

B.

Jonathan Stephen O'Mara was indicted by a grand jury in the City of Virginia Beach for attempting to burn a cross with the intent of intimidating a person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. O'Mara

entered a guilty plea that reserved his right to file an appeal challenging the constitutionality of Code § 18.2-423.

The court fixed O'Mara's punishment at incarceration in the jail for a term of 90 days and imposed a fine of $2,500 on each of the charges. O'Mara appealed the judgment to the Court of Appeals, which affirmed his convictions. *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000).

O'Mara entered into a stipulation of facts with the Commonwealth, which was made a part of the record in the circuit court. The stipulation states: "On May 2, 1998, David Targee had approximately fifteen individuals, including Jonathan O'Mara and Richard Elliott, at his residence in Virginia Beach. They were all consuming alcohol. Elliott complained to Targee and O'Mara about his neighbor and about how he wanted to 'get back' at him. It was suggested (not by O'Mara) that they burn a cross in Elliott's neighbor's yard. O'Mara and Targee agreed, and they all went to Targee's garage where a cross was built. They all got in Targee's truck and drove to Munden Point Road in Virginia Beach. Targee was driving, with O'Mara in the front passenger seat and Elliott in the back seat. Once there, Elliott handed the cross to O'Mara, who also grabbed a can of lighter fluid and went outside and placed the cross in the yard of Elliott's neighbor. He then poured lighter fluid on the cross, set it on fire, and ran back to the car. Targee drove them back to his house. The next morning, Elliott's neighbor, James Jubilee, came out of his house and observed the partially burned cross in his yard. He broke the cross and placed [it] in the garage. He later called the police."

C.

A grand jury in the City of Virginia Beach indicted Richard J. Elliott for attempting to burn a cross on the property of James S. Jubilee with the intent of intimidating any person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. At the conclusion of a trial, the jury found Elliott guilty of attempted cross burning with the intent to intimidate and fixed his punishment at 90 days incarceration in jail and a fine of $2,500. Elliott appealed the circuit court's judgment to the Court of Appeals, which affirmed his conviction. *See O'Mara*, 33 Va. App. 525, 535 S.E.2d 175.

The following evidence was adduced at the trial. James Jubilee resided at 2044 Munden Point Road in Virginia Beach. One day, Mr. Jubilee told his next door neighbor, Mrs. Elliott, that he was concerned because persons were discharging firearms in her backyard. Mrs. Elliott responded that her husband maintained a firing range in the rear of her yard.

On May 2, 1998, David Targee had a party at his home where he entertained Jonathan O'Mara, Richard Elliott, and others. Richard Elliott, who had consumed alcoholic beverages, mentioned that "his neighbors were complaining about him shooting in his backyard. . . . He wanted to get back at them for doing it."

Later that evening, Targee, Elliott, and O'Mara went to Targee's parents' garage and constructed a wooden cross. After they had constructed the cross, they traveled by car to Mr. Jubilee's home where O'Mara placed the cross in the yard and ignited it. The next morning

between 8:15 and 8:30, Mr. Jubilee saw the cross, which contained "burn spots." He picked it up and broke it.

Jennifer Luning, O'Mara's former "girlfriend," testified that O'Mara admitted that he, Targee, and Richard Elliott had burned the cross. "He had said that before they actually went out and did it that there was a conversation taking place about Richard had been complaining or the neighbors had been complaining about shooting [guns] in the backyard."

Edwin Coyner, a fire investigator for the City of Virginia Beach, testified that he interviewed Targee several times. Targee informed Coyner that "Richard Elliott had complained about his neighbors because the neighbors had complained about him shooting in the backyard."

II.

A.

The First Amendment of the Constitution of the United States provides in part: "Congress shall make no law . . . abridging the freedom of speech." Article I, § 12 of the Constitution of Virginia states:

> "That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press,

> nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

The Fourteenth Amendment prohibits state action in violation of the First Amendment. The freedom of speech guaranteed by Article I, § 12 of the Constitution of Virginia is co-extensive with the protections guaranteed by the First Amendment of the Constitution of the United States.

Code § 18.2-423 states:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

B.

We have held, since the birth of this Commonwealth, that "the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof." *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 40 (1793). However, clearly engrained within our jurisprudence is the principle that this Court

> "can declare an act of the general assembly void *only* when such act *clearly and plainly* violates the

> [C]onstitution, and in such manner as to leave no doubt or hesitation on our minds.
>
> "This rule has been repeatedly declared by this court.
>
> . . . .
>
> The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between the people and their immediate representatives."

Commonwealth v. Moore, 66 Va. (25 Gratt.) 951, 953 (1875). Indeed, we have repeatedly held that "[e]very act of the legislature is presumed to be constitutional, and the courts are powerless to declare an act invalid, except where it appears beyond doubt that it contravenes some provision of the State or Federal Constitution. If we doubt we must sustain its constitutionality." *Tobacco Growers' Co-Operative Assoc. v. Danville Warehouse Co.*, 144 Va. 456, 469, 132 S.E. 482, 486 (1926). We restated this fundamental principle in *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959):

> "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law. As we said in *Almond v. Day*, 199 Va. 1, 6, 97 S.E.2d 824[, 828 (1957)]: ' . . . It is only where an act is plainly repugnant to some constitutional provision that the courts can declare it null and void. If there be a reasonable doubt whether the

act violates the fundamental law, that doubt must be resolved in favor of the act.' "

Accord Jefferson Green Unit Owners Assoc., Inc. v. Gwinn, 262 Va. 449, 459, 551 S.E.2d 339, 344 (2001); *Motley v. Virginia State Bar,* 260 Va. 243, 247, 536 S.E.2d 97, 99 (2000); *Finn v. Virginia Retirement System,* 259 Va. 144, 153, 524 S.E.2d 125, 130 (2000); *Pulliam v. Coastal Emergency Services,* 257 Va. 1, 9, 509 S.E.2d 307, 311 (1999); *Mumpower v. Housing Authority,* 176 Va. 426, 443, 11 S.E.2d 732, 738 (1940); *Antoni v. Wright,* 63 Va. (22 Gratt.) 833, 882 (1872); *Auditor of Public Accounts v. Graham,* 5 Va. (1 Call) 475, 476 (1798). For some inexplicable reason, the majority ignores this fundamental principle.

C.

Black, O'Mara, and Elliott (the defendants), relying principally upon *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), argue that Code § 18.2-423 violates their right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States and Article I, § 12 of the Constitution of Virginia and that the Court of Appeals erred by holding that the statute comported with these constitutional provisions. I disagree with the defendants.

Initially, I observe that Code § 18.2-423, by its express terms, does not proscribe every act of burning a cross. Rather, Code § 18.2-423 only proscribes the act of burning a cross when such act is performed "with the intent of intimidating any person or group of persons" and the act is committed "on the property of another, a highway or

other public place." In the context of our criminal statutes, specifically Code § 18.2-61, we have defined intimidation as acts which put the victim "in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria." *Sutton v. Commonwealth,* 228 Va. 654, 663, 324 S.E.2d 665, 669 (1985).

Thus, applying the clear and unambiguous language in Code § 18.2-423 in conjunction with our established definition of intimidation, which the majority ignores, I conclude that Code § 18.2-423 only proscribes conduct which constitutes "true threats." And, I note that the United States Supreme Court, in *Watts v. United States,* 394 U.S. 705, 707 (1969), approved the facial constitutionality of a federal criminal statute that prohibited someone from threatening the life of the President of the United States. It is well established that true threats of violence can be proscribed by statute without infringing upon the First Amendment. *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 774 (1994); *Nat'l Organization for Women, Inc. v. Scheidler,* ___ F.3d ___, ___ (7th Cir. 2001); *Bauer v. Sampson,* 261 F.3d 775, 782 (9th Cir. 2001); *United States v. Rahman,* 189 F.3d 88, 115 (2nd Cir.), *cert. denied,* sub nom. *Nosair v. United States,* 528 U.S. 982 (1999); *United States v. Francis,* 164 F.3d 120, 122-23 (2nd Cir. 1999); *United States v. J.H.H.,* 22 F.3d 821, 825 (8th Cir. 1994). However, I must continue this inquiry regarding the constitutionality of Code § 18.2-423 because in *R.A.V., supra,* the Supreme Court held that the First Amendment

imposes certain limitations upon the regulation of speech and expressive conduct, including true threats.

In *R.A.V.*, the Supreme Court considered whether an ordinance was facially invalid under the First Amendment. In *R.A.V.*, the defendant, along with several other teenagers, made a wooden cross and burned it in a yard owned by a black family. The defendant was convicted of violating the following ordinance:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Supreme Court held that the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the content of the speech, even though the Minnesota Supreme Court had concluded that the ordinance only prohibited unprotected "fighting words." *R.A.V.*, 505 U.S. at 379-81.

The Supreme Court observed, however, that certain "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of

proscribing *only* libel critical of the government." *Id.* at 383-84.

The Supreme Court explained:

> "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience – i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707 (1969). . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example . . . a State may choose to regulate price advertising in one industry, but not in others, because the risk of

> fraud . . . is in its view greater there. . . . But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

R.A.V., 505 U.S. at 388-89.

The Supreme Court also articulated a second basis which would permit some degree of content-based discrimination.

> "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). . . . A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech, but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.
>
> "These bases for distinction refute the proposition that the selectivity of the restriction is 'even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say." ' *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555 (1981). . . . There may be other

> such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. . . . Save for that limitation, the regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."

R.A.V., 505 U.S. at 389-90.

In invalidating the City of St. Paul's ordinance, the Supreme Court stated that

> "[a]lthough the phrase in the ordinance 'arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."

Id. at 391.

Continuing, the Supreme Court explained:

> "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred and, in particular, as applied to this case, messages 'based on virulent notions of racial supremacy.' "

Id. at 392 (citation omitted).

Contrary to the majority's opinion, Code § 18.2-423 does not suffer from the defects contained in the ordinance at issue in *R.A.V.* As previously stated, Code § 18.2-423 does not prohibit every act of burning of a cross. Rather, the statute only prohibits the burning of a cross when such act is performed with the intent to intimidate. And, consistent with our jurisprudence, the word "intimidate" means to place one in fear of bodily harm. Unlike the City of St. Paul's ordinance, which targeted cross burning on the basis of race, color, creed, religion or gender, Code § 18.2-423 does not contain those limitations. The conduct proscribed in the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate. That point is best illustrated in *O'Mara* and *Elliott* because these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliotts' yard, not because of any racial animus.

Additionally, the Supreme Court pointed out in *R.A.V.* that a valid basis for according differential treatment even to a content-defined subclass of proscribable speech is when the subclass happens to be associated with particular secondary effects of the speech so that the regulation is justified without reference to the content of the speech. The ordinance that the Supreme Court invalidated in *R.A.V.* targeted any cross burning that "one knows or has reasonable grounds to know arouses anger, alarm or resentment." 505 U.S. at 380.

By contrast, from its clear and unambiguous language, the purpose of the Virginia statute, Code § 18.2-423, is not to suppress repugnant ideas, but rather to proscribe physical acts intended to inflict bodily harm upon the victims of such acts. Simply stated, the Virginia statute proscribes acts of intimidation, but it does not prohibit persons from expressing their views, irrespective of how repugnant or offensive those views may be to others. The Virginia statute does not prohibit the burning of a cross so long as that act is committed without an intent to place a person in fear of bodily harm. *See also In re Steven S.*, 31 Cal. Rptr. 2d 644, 646, 647-48 (Cal. Ct. App. 1994) (statute proscribing the act of "burn[ing] a cross on the private property of another for the purpose of terrorizing the owner or occupant or in reckless disregard of that risk" is not impermissible content-based prohibition on speech within the meaning of the First Amendment); *State v. Talley*, 858 P.2d 217, 220, 225-27 (Wash. 1993) (statute proscribing cross burning that places another person in reasonable fear of harm to his person or property does not violate the First Amendment).

I recognize that the Supreme Court of South Carolina, in *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), invalidated a statute that prohibited the burning of a cross on the basis that it contravened the First Amendment. The South Carolina statute, however, was significantly different from the Virginia statute. The South Carolina statute stated: "It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part . . . without first obtaining written permission of the owner or occupier of the premises so to do." *Id.* at 514.

Unlike Code § 18.2-423, which proscribes the burning of a cross with the intent of intimidating and, thus, prohibits real threats, the South Carolina statute contained no similar limitation. The Supreme Court of South Carolina concluded that its statute was enacted "in order to protect individuals and society as a whole from the reprehensible messages often sought to be symbolicly [sic] expressed by a burning cross." *Ramsey*, 430 S.E.2d at 514. As I have already explained, Virginia's statute does not suffer from this constitutional defect. Thus, the differences between the Virginia statute and the South Carolina statute are real and significant. Yet, the majority ignores the differences between Code § 18.2-423 and the South Carolina statute.

I also observe that the Maryland Court of Appeals, in *State v. Sheldon*, 629 A.2d 753, 755 (Md. 1993), held that a Maryland statute violated the First Amendment because it required those who wished to burn crosses or religious symbols to "secure the permission of the property owner

where the burning is to occur and [to] notify the local fire department before engaging in the burning." That statute stated in part:

> "It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place."

Id. at 755. Unlike the Virginia statute, the Maryland statute did not proscribe burning a cross with the intent of intimidating, but rather, is content-based regulation of expression. The Maryland Supreme Court found "no way to justify the cross burning statute without referring to the substance of speech it regulates, because the statute does not protect property owners or the community from unwanted fires any more than the law already protected those groups before the statute's enactment." *Id.* at 755. Yet, the majority ignores these significant distinctions.

IV.

Defendant Black argues that Code § 18.2-423 "does not incorporate the requirements that the speech at issue be directed to the incitement of imminent lawless action, and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio*, and the *Brandenburg* standard was not satisfied here." I disagree with the defendant. The Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) simply has no application here.

The Supreme Court considered the following facts in *Brandenburg*. Brandenburg, "a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' " *Id.* at 444-45 (alteration in original).

Brandenburg placed a telephone call to a reporter on the staff of a television station and invited the reporter to attend a Ku Klux Klan rally that would be held at a certain farm. "[T]he reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network." *Id.* at 445. The prosecutor relied upon the films and testimony identifying the defendant as the person who communicated with the reporter and who spoke at the rally. The prosecutor "also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films." The only persons present at the rally other than the participants were the newsmen who made the film. *Id.* at 445-46.

The Supreme Court pointed out that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Continuing, the U.S. Supreme Court stated that

> "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control."

Id. at 448.

The Supreme Court invalidated the Ohio Criminal Syndicalism Act because neither the indictment nor the trial court's instructions to the jury "refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448-49.

In stark contrast to the Supreme Court's decision in *Brandenburg*, we are not concerned here with abstract teaching regarding the moral propriety or even moral necessity of violence as a means for accomplishing political reform. Rather, the subject of this case is Code § 18.2-423, a statute which proscribes the burning of a cross with the intent to intimidate, which we have held means to place the victim in fear of bodily harm. And, I note that the jury at defendant Black's trial was specifically instructed that

> "[i]ntimidate, as used in the term 'with the intent to intimidate' means a motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of

> the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria."

I have already observed, in response to defendant's counsel's questions at trial, Rebecca Sechrist testified that she was afraid that her "home would get burned or something would happen to it." Moreover, defendant Black has never challenged the sufficiency of the evidence to support the jury's finding beyond a reasonable doubt that his acts placed Sechrist in fear of bodily harm.

IV.

Defendant Black argues that "[t]he provision of Code § 18.2-423 providing that the burning of a cross shall be *prima facie* evidence of an intent to intimidate permits a jury to find intimidation from the mere act of cross-burning alone, in contravention of the First Amendment." I disagree.

Code § 18.2-423 creates a statutory inference, and we have stated that an "inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best." *Martin v. Phillips*, 235 Va. 523, 526 n.1, 369 S.E.2d 397, 399 n.1 (1988). Additionally, "inferences are never allowed to stand against ascertained and established facts." *Ragland v. Rutledge*, 234 Va. 216, 219, 361 S.E.2d 133, 135 (1987) (citing *Southern Ry. v. Mays*, 192 Va. 68, 76, 63 S.E.2d 720, 725, *cert. denied*, 342 U.S. 836 (1951)).

This statutory inference is a factor that the jury may accept or reject in determining whether a defendant

burned a cross with the intent to intimidate a victim. This inference alone, however, is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate. And, this statutory inference does not, and cannot, absolve the Commonwealth of its burden to prove each element of Code § 18.2-423 beyond a reasonable doubt.

Moreover, the jury in Black's trial was specifically instructed as follows:

"INSTRUCTION NO. 6

"THE COURT INSTRUCTS THE JURY THAT:

> "The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged. It is not sufficient that the jury believe the defendant's guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction. The evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense and unless you believe that the guilt of Barry Elton Black has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find him not guilty."

. . . .

"INSTRUCTION NO. 8

"THE COURT INSTRUCTS THE JURY THAT:

"The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

"(1) That the defendant burned or caused to be burned a cross in a public place; and

"(2) That he did so with the intent to intimidate any person or group of persons.

"If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

"If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty."

As these jury instructions indicate, the Commonwealth was required to prove each and every element of its case, including the requirement of intimidation, beyond a reasonable doubt.

V.

For the foregoing reasons, I would affirm the judgments of the Court of Appeals.

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 19th *day of* December, 2000.

Barry Elton Black, Appellant,

against Record No. 1581-99-3
Circuit Court No. CR 98-461

Commonwealth of Virginia, Appellee.

From the Circuit Court of Carroll County

Before Chief Judge Fitzpatrick,
Judges Coleman and Frank

For the reasons stated in *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000), we affirm the judgment of the trial court.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk
By: /s/ Marty V. P. Ring
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Bray and Bumgardner
Argued at Chesapeake, Virginia

JONATHAN STEPHEN O'MARA

v. Record No. 0992-99-1

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 0997-99-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RICHARD S. BRAY
OCTOBER 3, 2000

FROM THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH
Frederick B. Lowe, Judge

Kevin E. Martingayle (Stallings & Richardson, P.C., on briefs), for Jonathan Stephen O'Mara.

James O. Broccoletti (Zoby & Broccoletti, on brief), for Richard J. Elliott.

H. Elizabeth Shaffer, Assistant Attorney General; John H. McLees, Jr., Senior Assistant Attorney General (Mark L. Earley, Attorney General, on briefs), for appellee.

Pursuant to the terms of a plea agreement, Jonathan O'Mara pled guilty to "Attempted Cross Burning" and "Conspiracy to Commit a Felony," violations of Code §§ 18.2-423 and 18.2-22, respectively, expressly reserving the right to appeal a prior order of the trial court which denied his challenge to the constitutionality of Code

§ 18.2-423. In a separate proceeding, Richard J. Elliott, codefendant with O'Mara, was convicted by a jury for attempted cross burning, after joining with defendant O'Mara in the unsuccessful challenge to the constitutionality of Code § 18.2-423 before the trial court.[1]

Accordingly, both O'Mara and Elliott (defendants) maintain on appeal "that the code section is unconstitutional as violative of the free speech and expression protections" guaranteed by both the United States and Virginia Constitutions. Joining the two appeals for resolution by this Court, we affirm the respective convictions.

I.

The substantive facts are uncontroverted. On the evening of May 2, 1998, defendants, together with "approximately fifteen individuals," were "consuming alcohol" at the Virginia Beach home of David Targee. When defendant Elliott expressed unspecified "complaint[s] . . . about his neighbor," James Jubilee, and his desire to " 'get back' at him," someone "suggested that they burn a cross in [Jubilee's] yard." In response, Targee and defendants immediately constructed a crude cross in Tragee's garage and proceeded in Targee's truck to the Jubilee home. Elliott "handed the cross" to defendant O'Mara, who erected and ignited it on Jubilee's property, and the

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[1] Although Judge Lowe presided at the trials of both O'Mara and Elliott, defendants' constitutional challenges were decided by Judge Alan E. Rosenblatt, following an extensive hearing and related argument and memoranda of law.

three returned to Targee's residence. The respective records do not clearly specify Jubilee's race.

Jubilee later discovered the "partially burned cross" and notified police, resulting in the subject prosecutions for violations of code § 18.2-423 and the attendant conspiracy.

II.

Code § 18.2-423 provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Defendants contend that the statute impermissibly infringes upon expressive conduct, speech protected by the First and Fourteenth Amendments to the Constitution of the United States and Article I, § 12 of the Virginia Constitution, and, therefore, is "plainly unconstitutional."[2]

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[2] "[L]itigants may challenge a statute on first amendment grounds even when their own speech is protected." *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 241-42 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

" 'In assessing the constitutionality of a statute . . . [t]he burden is on the challenger to prove the alleged constitutional defect.' " *Woolfolk v. Commonwealth*, 18 Va. App. 840, 848, 447 S.E.2d 530, 534 (1994) (quoting *Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991)).

> "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law." *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

Moses v. Commonwealth, 27 Va. App. 293, 298-99, 498 S.E.2d 451, 454 (1998).

The First Amendment declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment prohibits state action in violation of the First Amendment.

Similarly, Article I, § 12 of the Virginia Constitution establishes:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

"Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth*, 21 Va. App. 729, 739-40, 467 S.E.2d 306, 311 (1996).

Although "[t]he First Amendment literally forbids the abridgement only of 'speech,' " the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In identifying expressive conduct, the Court must determine "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Id.* (alterations in original) (quoting *Spence*, 418 U.S. at 410-11). If so, a proscription of such activity by government "because of disapproval of the ideas expressed" is "content based" suppression of free speech, offensive to the First Amendment and "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

However, "our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *Id.* at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, First Amendment protection "does not include a freedom to disregard these traditional limitations," thereby allowing government to regulate obscenity, defamation, "fighting words," *id.* at 383 (citing *Chaplinsky*, 315 U.S. at 572), and threats of violence. *See id.* at 383, 388 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)); *see also In re: Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Ct. App. 1994) (holding that threats and fighting words are "remove[d] . . . from the scope of the First Amendment"); *Florida v. T.B.D.*, 656 So. 2d 479, 480-81 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996) (concluding that threats of violence and fighting words are proscribable because government has "valid interest" in protecting citizens both from fear of violence and violence).

The " 'true threat' " doctrine articulated by the Supreme Court in *Watts* permits punishment of actual speech or expressive conduct "when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm." *In re: Steven S.*, 31 Cal. Rptr. 2d at 647 (citing *Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990)). Similarly, the Court's "fighting words doctrine" expressed in *Chaplinsky* removes the shield of the First Amendment from "statements 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' " *Id.* (quoting *Chaplinsky*, 315 U.S. at 572); *see Cohen v. California*, 403

U.S. 15, 20 (1971) (describing fighting words as expressions likely to provoke a violent reaction when directed to another).

Here, the provisions of Code § 18.2-423 specifically prohibit the burning of a cross "on the property of another, a highway or other public place," "with the intent of intimidating any person or group of persons." Historically, a flaming cross is "inextricably linked . . . to sudden and precipitous violence – lynchings, shootings, whippings, mutilations, and home-burnings," a "connection . . . [with] forthcoming violence [that] is clear and direct." *T.B.D.*, 656 So. 2d at 481. Hence, "a burning cross conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1992).

Manifestly, the pernicious message of such conduct, a clear and direct expression of an intention to do one harm, constitutes a true threat envisioned by *Watts*, irrespective of racial, religious, ethnic or like characteristics peculiar to the victim. Moreover, the attendant fear and intimidation subjects the victim to an immediate and calculated injury that invites a breach of the peace, fighting words within the intendment of *Chaplinsky*. Thus, although such expressive conduct doubtless constitutes speech, the prohibition of which unavoidably implicates content, the message is beyond the protection of the First Amendment and appropriately subject to proscription by government.

Defendants' reliance upon *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to support the contention that Code

§ 18.2-423 unconstitutionally prohibits "merely intimidating someone," at once ignores the well-established symbolism of the burning cross and misapplies *Brandenburg*. *Brandenburg* addressed a challenge to the constitutionality of Ohio's "Criminal Syndicalism statute," which proscribed, *inter alia*, the " 'advocacy . . . [of] the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform.' " *Id.* at 444-45. Thus, the *Brandenburg* Court was concerned with the propriety of governmental restrictions on the "advocacy of the use of force or of law violation" in the context of a reform movement, an issue unrelated to the vile and malevolent expression contemplated by Code § 18.2-423. *Id.* at 447. Accordingly, the *Brandenburg* admonishment that states may "forbid or proscribe [such] advocacy" only if "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" does not similarly delimit proscribable threats and fighting words. *Id.*

Defendants' assertion that *R.A.V. v. St. Paul* "makes it clear . . . § 18.2-423 is unconstitutional" is, likewise, without merit. *R.A.V.* examined the constitutionality of a St. Paul, Minnesota ordinance, which provided, in pertinent part,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380 (citing Minn. Legis. Code § 292.02 (1990)). Unlike code § 18.2-423, which proscribes cross burnings with the intent to intimidate anyone, the St. Paul ordinance prohibited such "speech solely on the basis of the subjects the speech addresses," race, color, creed, religion or gender. *R.A.V.*, 505 U.S. at 381.

In declaring the enactment unconstitutional, the Supreme Court accepted the "authoritative statement" by the Minnesota Supreme Court "that the ordinance reaches only those expressions that constitute 'fighting words,' "[3] *id.* at 381, and reaffirmed the doctrine that "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* – (obscenity, defamation, [threats, fighting words] etc.)." *Id.* at 383 (emphasis in original). However, the Court cautioned that such "categories of speech [are not] entirely invisible to the Constitution" and cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. Thus, when "St. Paul . . . proscribed fighting words of *whatever* manner that communicates messages of racial, gender or religious intolerance," the city impermissibly engaged in "[s]electivity [which] creates the possibility that [it] is seeking to handicap the expression of *particular* ideas." *Id.* at 394 (emphasis added); *see In re: Steven S.*, 31 Cal. Rptr. 2d at 649 ("speech and expressive conduct may be regulated [but] such regulation may not discriminate within that category on the basis of content"); *T.B.D.*, 656

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[3] In overruling defendants' constitutional challenges in the instant prosecutions, Judge Rosenblatt also determined that code § 18.2-243 regulated fighting words.

So. 2d at 4781 (such regulation may not "play [ ] favorites").

In contrast, Code § 18.2-423 regulates, without favor or exception, conduct, which, despite elements of expression and content, is unprotected by the First Amendment.[4]

Finally, defendant challenges Code § 18.2-423, first, as overbroad, regulating both protected and unprotected speech, and, secondly, as underinclusive, ignoring other modes of proscribable speech. However, overbreadth assumes constitutional dimension only when " 'there [is] a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the court.' " *Parker v. Commonwealth*, 24

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[4] Post-*R.A.V.* decisions of other jurisdictions cited by defendant in support of a different result involve statutes substantially dissimilar from Code § 18.2-423. *See Pinette v. Capitol Square Review and Advisory Bd.*, 874 F.Supp. 791 (S.D. Ohio 1994) (statute established permit requirements to conduct public assembly); *State v. Shelton*, 629 A.2d 753 (Md. 1993) (statute proscribed cross burning to protect property owners from unwanted fires and safeguard community from fires generally); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (statute proscribed messages based upon race, color, creed or religion); *State v. Talley*, 858 P.2d 217 (Wash. 1993) (statute proscribed certain conduct related to the race, color, religion, ancestry, natural origin, or mental, physical or sensory handicap of another).

In contrast, jurisdictions examining the constitutionality of statutes more akin to Code § 18.2-423 are in accord with our conclusion. *See In re: Steven S.*, 31 Cal. Rptr. 2d 644 (statute proscribed cross-burning intended to terrorize owner or occupant); *T.B.D.*, 656 So. 2d 479 (statute proscribed burning of cross on property of another without permission).

Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)). The prohibition of Code § 18.2-423 is expressly limited to a person or persons burning a cross with the specific intent to intimidate another, a threat and fighting words unworthy of First Amendment guarantees. Further, underinclusiveness is condemned by *R.A.V.* only if the result is content discrimination. *See R.A.V.*, 505 U.S. at 387. Code § 18.2-423 criminalizes a long recognized, particularly virulent and incendiary mode of proscribable expressive conduct, a prohibition free of content discrimination.

We, therefore, conclude that Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence. The statute does not discriminate in its prohibition and is neither overbroad nor underinclusive.

Accordingly, we affirm the convictions.

Affirmed.

CONVICTION AND SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT
OF CARROLL COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 035

Hearing Date: June 23, 1999
Judge: DUANE E. MINK

COMMONWEALTH OF VIRGINIA

v.

BARRY ELTON BLACK, DEFENDANT

This day came the defendant, who appeared in person with his attorney, David P. Baugh. The Commonwealth was represented by Gregory G. Goad. Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the Indictment, which plea was tended by the accused in person.

After being advised by the Court of his right to trial either by jury or by the Court and, after consultation with counsel, the accused did not waive his right to trial by jury and to which the Court approved.

The Court then impaneled twenty qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their rights to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the evidence was presented by the Commonwealth and the defendant.

At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which motion was overruled and exception was noted.

At the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled and exception was noted.

After hearing the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words:

Costs. The defendant shall pay costs of $4107.50. The defendant is Ordered to pay unto the Commonwealth its costs in this case pursuant to law including any Court appointed counsel fee allowed by this Court. The defendant was advised by the Court that his driver's license shall be revoked according to Virginia Code Section 46.2-395, and that he is subject to further charges as set forth in Virginia Code Section 19.2-358 for failure to pay according to the direction of the Court. The defendant shall pay according to a schedule to be filed with the Court for monthly payments which are due each month until all costs are paid in full.

And it is further Ordered that pursuant to Section 19.2-310.3 of the Code of Virginia, as amended, the defendant shall have a sample of his blood taken for analysis. The Court Orders the defendant to cooperate fully and promptly in permitting the said withdrawal of blood as required by law. The Court Orders the defendant to report to the New River Valley Regional Jail on June 24, 1999, at 9:00 a.m., for the withdrawal of the said sample of blood in accordance with law.

Thereupon, the jury was discharged.

And counsel for the defendant moved the Court to stay the execution of the fine pending the defendant's decision regarding appeal and the perfection of said appeal if so noted, and which motion is granted. The Court further Orders a stay in the payment of costs to the Commonwealth pending the perfection of an appeal if noted.

The Court certifies that at all times the defendant was personally present with his attorney who capably represented him.

June 28, 1999 (DATE) ENTER: /s/ Duane E. Nuich (JUDGE)

DEFENDANT IDENTIFICATION:

Alias: none
SSN: 159-40-8378 DOB: 1/6/48 Sex: male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: $2,500.00 fine

TOTAL SENTENCE SUSPENDED: none

TWENTY-SEVENTH JUDICIAL CIRCUIT
OF VIRGINIA

(LOGO)

COMMONWEALTH OF VIRGINIA

[Name And Address Omitted In Printing]

March 18, 1999

[Filed Aug. 31, 1999]

Mr. David P. Baugh
Attorney at Law
223 South Cherry Street
P. O. Box 12137
Richmond, Virginia 23241

Mr. Gregory G. Goad
Commonwealth Attorney
County of Carroll
P. O. Box 280
Hillsville, Virginia 24343

Re: Commonwealth of Virginia versus Barry E. Black
Case Number 98-8954

Dear Counselors:

Please be advised that I have reviewed all of the memorandums filed in this cause, both in the General District Court and in the Circuit Court, on behalf of each of the parties, and the Amiscus [sic] Curiae brief filed in support of the defendant's position in this matter, and I have given due consideration thereto.

The issue before the Court is the motion to dismiss the indictment against the defendant, Barry E. Black, upon the ground that Section 18.2-423, Code of Virginia is

unconstitutional and violates the freedom of speech violations of the First Amendment of the United States Constitution, and Article I, Section 12 of the Virginia Constitution. In support of that motion, the defendant alleges as follows:

1. Section 18.2-423 discriminates on the basis of content and viewpoint and is unconstitutional under the doctrine of *R. A. V. v. City of St Paul.*

2. Section 18.2-423 does not incorporate the requirement that the speech at issue be directed to the incitement of imminent lawless action and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio.*

3. The prima facie evidence standard of Section 18.2-423 creates an unconstitutional presumption.

4. Section 18.2-423 is unconstitutionally vague and overbroad.

Rather than discuss the issues in the chronology set forth above, the court has determined that it would be appropriate to consider them, to the extent necessary, in reverse order. I have chosen this approach since the ultimate reviewing authority, the United Sates Supreme Court, has held that in construing ordinances that Court is bound by the construction given to it by the State Court. *R. A. V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381; 112 S.Ct. 2538, 2542 (1992). First it is noted for the record that the Commonwealth in this case is represented, not only by the local Commonwealth Attorney, Gregory G. Goad, but also by John McLees, from the Office of the Attorney General of the Commonwealth of Virginia. The Court is of the

opinion that the arguments set forth in the memorandums filed on behalf of the Commonwealth represents not only the official position of the Commonwealth Attorney of Carroll County, but also the Attorney General's Office of the Commonwealth of Virginia. Throughout the lower court proceedings and in the current proceedings in the Circuit Court, the Commonwealth has maintained the gravaman [sic] of the offense is intimidation in that Code Section 18.2-423[1] criminalizes on the burning of a cross "with the specific intent to intimidate", (Comm. Brief Gen. Dist. Ct., Page 3 and Comm. Brief, Cir.Ct., Page 3). In addition, in support of its response to the allegation that the section is vague and overboard its position is that "intimidation" as used in such statutes, means putting one in fear of bodily harm and further that statutory construction would require this Court to construe the word narrowly, (Comm. Supplemental Brief, Page 10).

In responding to the defendant's allegation that the prima facie provision of the statute creates an unconstitutional presumption, the Commonwealth concedes that "the 'prima facie' provision does not preclude review by a case-by-case basis of whether the defendant did in fact intend to intimidate others by his act of cross burning. On the contrary, it *requires* such review. It merely establishes

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[1] Section 18.2-423, Code of Virginia, states: It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

that a reasonable inference of such intent can be drawn from cross-burning. The ultimate burden of persuasion of intent to intimidate always rests upon the Commonwealth. Thus, it is always open to the defendant to contest the issue of whether that intent existed, and the burden is on the Commonwealth to prove such intent, as a matter of fact, beyond a reasonable doubt, and *without regard* to whether the defendant has presented evidence on that issue or not". (Comm. Supplement Brief, Page 9).

The Commonwealth concludes by stating "It is clear from reading the law that, notwithstanding the 'prima facie' provisions, the ultimate burden is still on the Commonwealth to prove beyond a reasonable doubt that the defendant *actually* intended to intimidate others by his actions".

This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused actually intended to intimidate others by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and Article 1, Section 12 of the Virginia Constitution. The narrow application of the provisions of the above referenced section can be adequately addressed by appropriate instructions to the jury and well defined perimeters with regard to admission of evidence to the very limited and precise criminal act defined therein.

Accordingly, the defendant's Motion to Dismiss the indictment is denied. I request that Mr. Goad contact Mr. Baugh to arrange a suitable date to proceed with the trial of this case.

I commend both of you gentlemen on the time, effort and excellent memorandums which you submitted to the Court in support of your respective positions.

With best regards.

Yours very truly,

/s/ Duane E. Mink
Duane E. Mink

DEM:nc

Commonwealth v. Black

INSTRUCTION NO. 8

THE COURT INSTRUCTS THE JURY THAT:

The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant burned or caused to be burned a cross in a public place; and

(2) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

INSTRUCTION NO. 8-1

THE COURT INSTRUCTS THE JURY THAT:

Intimidate, as used in the term "with the intent to intimidate" means a motivation to intentionally put a

person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria.

INSTRUCTION NO. 9

THE COURT INSTRUCTS THE JURY THAT:

The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent.

INSTRUCTION NO. 10

THE COURT INSTRUCTS THE JURY THAT:

A "public place" is any place open to the knowledge or view of all; generally seen or known; without privacy or concealment.

VERDICT FORM

We the jury find the Defendant guilty of burning a cross in a public place with the intent to intimidate, as charged in the indictment.

/s/ Dannie Martin
FOREMAN

We the jury find the Defendant not guilty.

_____
FOREMAN

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

SENTENCING ORDER – CASE NO.: CR98-3631

Attorney for the Commonwealth:	A. Farashahi and S. Vachris
Attorney for the Defendant:	J. Broccoletti
Court Reporter:	Ronald Graham & Associates, Inc.

The defendant was again present and represented by counsel.

On February 23, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the

defendant desired to advance any reason why judgment should not be pronounced.

In accordance with the jury's verdict, the Court **SENTENCES** the defendant to:

> Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00.
>
> The defendant shall pay costs of $1,393.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: FEBRUARY 23, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

OFFENSE:	OFFENSE DATE:
CONSPIRACY	MAY 2, 1998
ATTEMPTED CROSS BURNING TO INTIMIDATE	MAY 2, 1998

CRIMINAL ORDER – Case No.: CR98-3631

Attorney for the Commonwealth:	S. Vachris and A. Farashahi
Attorney for the Defendant:	J. Broccoletti
Court Reporter:	Ronald Graham & Associates, Inc.

The defendant was again present, in person, and represented by counsel.

This day came again a jury sworn for the trial of this case.

The jurors were again sent to the jury room to consider their verdicts. They subsequently return in open court the following verdicts:

1. We, the jury, find the defendant **GUILTY** of Attempted Cross Burning to Intimidate.

2. We, the jury, find the defendant **NOT GUILTY** of Conspiracy.

After the jury returned its verdicts, the defendant moved to poll the jury and all the jurors affirmed their vote as to the verdicts.

A separate proceeding limited to the ascertainment of punishment was held before the same jury. After hearing further evidence and argument of counsel, the jurors were sent to the jury room to consider punishment. They returned in open court the following verdict:

1. We, the jury, having found the defendant **GUILTY** of Attempted Cross Burning to Intimidate, fix his punishment at: confinement in jail for 90 days and a fine of $2,500.00.

After the jury returned its verdict, no motion was made to poll the jury as to its verdict.

The Court confirmed the jury's verdict finding the defendant **GUILTY** of Attempted Cross Burning to Intimidate and **NOT GUILTY** of Conspiracy, of which charge the defendant stands acquitted.

The case was continued until April 26, 1999 for sentencing. The Court ordered the Probation Office to prepare a presentence report.

The Clerk shall send a copy of this order to the Probation Office of this Court.

Bond Status: The defendant was continued on the same bond previously posted.

ENTERED: 2/25/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: JANUARY 20, 1999
JUDGE: ROSENBLATT

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT

INDICTMENT FOR:
CONSPIRACY
ATTEMPTED CROSS BURNING TO INTIMIDATE

ORDER – CASE NO.: CR98-3631

Court Reporter: Ronald Graham & Associates, Inc.

This day came A. Farashahi and S. Vachris, attorneys for the Commonwealth, the defendant, in person, and J. Broccoletti, attorney for the defendant.

After receiving briefs and hearing argument of counsel, the Court denied defendant's motion to dismiss the above charges for the reasons stated on the record.

This matter is presently set for motions on February 2, 1999.

ENTERED: 1-25-99

/s/ AA
JUDGE

COMMONWEALTH OF VIRGINIA

v.

Richard J. Elliott

INSTRUCTION NO. 5

The Court instructs the jury that the defendant is charged with the crime of attempted cross burning. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

1. The the defendant intended to commit cross burning; and
2. That the defendant did a direct act toward the commission of the cross burning which amounted to the beginning of the actual commission of the cross burning; and
3. That the defendant had the intent of intimidating any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

[given
2/22/99
/s/ FBL]

INSTRUCTION NO. 7

The Court instructs the jury that the intent required to be proved in an attempted crime is the specific intent in the person's mind to commit the particular crime for which the attempt is charged. In determining whether the intent has been proved, you may consider the conduct of the person involved and all the circumstances revealed by the evidence.

[given
2/22/99
/s/ FBL]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
JONATHAN STEPHEN O'MARA, DEFENDANT
SSN: 226-35-0947
DOB: 7/15/79

SENTENCING ORDER – CASE NO.: CR98-3193

Attorney for the Commonwealth: A. Farashahi and S. Vachris
Attorney for the Defendant: K. Martingale and M. Del Duca
Court Reporter: Ronald Graham & Associates, Inc.

The defendant was present and represented by counsel.

On February 22, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26
Conspiracy – F	5/2/98	18.2-22; 18.2-423

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the

defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

> Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00 on each of the charges of Attempted Cross Burning to Intimidate and Conspiracy. The sentences shall run concurrently with each other for a total sentence imposed of 90 days in jail and $2,500.00 fine.

The Court **SUSPENDS** 45 days of the 90-day jail sentence and $1,000.00 of the $2,500.00 fine conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for a period of 1 year.
2. **Costs.** The defendant shall pay costs of $433.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA v JONATHAN STEPHEN O'MARA, Defendant.	RECORD CR98-3193
COMMONWEALTH OF VIRGINIA v RICHARD J. ELLIOTT, Defendant.	RECORD CR98-3631

Before Hon. Alan E. Rosenblatt, Judge
Virginia Beach, Virginia
January 20, 1999

* * *

[21] THE COURT: All right. State statutes are entitled to a presumption of constitutionality. That's Horne book law. We all know that. The defendants maintain that as a content-based regulation of speech, this particular code section 18.2-423 is not entitled to such a presumption. They contend the statute violates the First and Fourteenth Amendments of the Constitution and have moved to dismiss this case. For the reasons that

follow, the court is going to overrule the defendants' motions.

I found the discussion this morning interesting. However, burning a cross in my opinion constitutes symbolic speech because it is an activity by which a person clearly intends to convey a particularized message; and there is a great likelihood that those who view the message will understand it. Therefore, it is an activity that may be protected by the First Amendment.

Further, the statute in question, 18.2-423, [22] is a regulation of conduct/speech that is content based, it is not content neutral. Clearly, in enacting the statute, the state – clearly, the state has adopted this regulation of statute because of disagreement with the message it conveys and because of its communicative impact. There can be no doubt – at least there's no doubt in my mind that Code Section 18.2-423 was enacted to censure a particular message of intimidation, which, as I said, makes – does not make it content neutral but content based; but because we're dealing with a message of this nature and because we're dealing with a particular message of intimidation, we're not dealing with a situation such as that expressed in Brandenburg. The Brandenburg analysis is not appropriate to the facts and to the statute in this particular case. What we're talking about is a content-based regulation of speech which must be analyzed by the court, and all such content-based regulations are presumptively unconstitutional. However, there are permitted exceptions in a few limited areas.

As the supreme court said in Chaplinsky, It is well understood that the right of free speech is not absolute at

all times and under all circumstances. There are certain well-defined and narrowly limited [23] classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting, or, quote, fighting words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Fighting words are words which by their very utterance inflict injury and intend to incite immediate breach of the peace. Code section 18.2-243 is clearly a legislative attempt to regulate fighting words. The statute does not regulate all cross burnings; it only regulates those done with the intent of intimidating any person or group of persons. Thus, the statute falls within the fighting words exception.

The leading case concerning the regulation of fighting words is well known in R.A.V. In that case the Supreme Court held that even though fighting words fall within a constitutionally proscribable category, the state may not regulate such speech based on [24] hostility, or favoritism, towards a nonproscribable message. In effect, the court ruled that statutes that regulate even fighting words must be neutral and cannot discriminate against

certain viewpoints. It ultimately determined that the statute in R.A.V. was unconstitutional because it only prohibited fighting words that insult on the basis of race, color, creed, religion or gender.

As Justice Scalia explained, quote, The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable and socially unnecessary mode of expressing whatever idea the speaker wishes to convey. Saint Paul has not singled out an especially offensive mode of expression. It has not, for example, selected for prohibition. Only those fighting words that communicate ideas in a threatening as opposed to a merely obnoxious manner. Rather it has proscribed fighting words of whatever manner that communicate messages of racial, gender or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.

In the court's opinion, the Virginia statute [25] differs significantly from the Minnesota statute. First, it does not – first, it does single out an especially offensive mode of expression by prohibiting conduct that is done with the intent to intimidate. Second, the statute is not limited to messages of racial, gender or religious intolerance. There is no selectivity in 18.2-243. The statute prohibits the entire class of speech. The statute does not, for example, proscribe only cross burnings done with the intent to intimidate someone on the basis of race or on the basis of national origin. The Virginia statute prohibits all cross burnings done with the intent to intimidate, regardless of the message the perpetrator is attempting to convey and

regardless of the social or political viewpoint the cross burner was trying to express. All that matters is that he attempted to send his message, whatever it was, with the intent to intimidate someone.

Now, the defendants have argued because the Virginia statute prohibits only cross burnings, it favors the cross as a religious symbol and is, therefore, content based and unconstitutional under R.A.V. This argument, however, confuses the regulation of a manner of expression with the regulation of a message. The statute regulates the intimidating manner [26] of expression, which is entirely permissible. The mere fact that the statute does not proscribe all fighting words of all kinds that convey messages of intimidation does not mean that the state is playing favorites. This is simply a constitutionally underinclusive regulation of a larger set of clearly proscribable speech. As explained in R.A.V., the regulation of fighting words may address some offensive instances and leave other equally offensive instances alone; and, as long as those instances of fighting words are regulated are done so in a neutral manner with regard to the message conveyed, there is no constitutional violation. Burning a cross with an intent to intimidate is an extremely hazardous manner of expression. There is a tremendous possibility for terror and violence. Because the statute evenhandedly bans all cases of this particularly dangerous form of expression, it passes constitutional muster.

On the second issue, the defendants have contended that the statute states that the burning – since the statute states that the burning of a cross shall be prima facie evidence of an intent to intimidate, it unconstitutionally

shifts the burden of proof to the defendant. It is well settled that the prosecution bears the burden of proving every [27] element of a crime beyond a reasonable doubt. However, inferences and presumptions are a staple of our adversary system of factfinding; and where these presumptions are rebuttable, quote, the general rule is to give such presumptions permissive or burden-of-production-shifting effect only.

The statute in this case creates a rebuttable presumption. The jury, if there is one, will be instructed that the burning of a cross by itself is sufficient evidence from which you may infer the required intent. The jury may infer, not must infer. Indeed, the presumption could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal.

Recognizing that the statute creates only a permissive inference, it is inappropriate at this time to consider the defendants' argument. As the Supreme Court has instructed, our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the court. None suggests that a court should pass on the constitutionality of this kind of statute on its face. To rule on the defendants' argument at this time, as I think was conceded by Mr. Broccoletti, would be to rule [28] on the constitutionality of the statute on its face. Accordingly, because the party challenging the invalidity of the statute must demonstrate its invalidity as applied to him, it will be necessary to determine the facts of the case, which can only be accomplished by the defendant going to trial. For those reasons, the motions of the defendants are denied.

MR. BROCCOLETTI: If the court would note our objection and exception.

MR. MARTINGAYLE: For the record, note our exception.

Judge, just for the record, I wanted to make the record clear that while you were out and for the benefit of opposing counsel, I had your clerk convey to you that we did find a cite in R.A.V. of Brandenburg at 2553 in the Supreme Court Reporter Addition, Footnote 4; and I don't know if you were made aware of that or not, but I wanted to make sure –

THE COURT: I think you made the point; so, yes, I did see it.

MR. MARTINGAYLE: Yes, sir.

(The hearing was concluded at 11:36 a.m.)

Richmond News Leader, Jan. 21, 1949, at 19

Police Aid Requested By Teacher

Cross is Burned In Negro's Yard

A Negro school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police today after the burning of a cross in his front yard last night.

At Second District, officer said patrolmen on the beat in which the residence is situated have been instructed to pay special attention to activities in that block, particularly during the day when both the complainant and his wife are in school.

The incident happened at about 8:30 o'clock last night in the yard of 2700 Barton Ave., now owned by J. M. Sweat, a teacher at George Mason School.

TOLD BY NEIGHBOR

Sweat said he and his wife were in the upstairs rooms listening to the radio and knew nothing of what was happening until a neighbor rang their doorbell and told them.

The burning cross, about five feet high, was covered with burlap bags soaked in oil. Witnesses said it had burned about 10 minutes before Sweat extinguished the flames by pouring water on them.

The householder, aided by police, removed the cross to the rear yard.

A small crowd had gathered and was watching the burning when Sweat emerged from the house and disposed of the flaming cross.

The Sweat family had moved into the house several weeks ago, but said this was the first trouble they have had. While all the other homes in the 2700 block now are occupied by whites, several of them have been purchased by Negroes, who expect to occupy them soon.

Mrs. Sweat, a student at Virginia Union University, said today she did not "have the slightest idea" who could have been responsible for the act, and added that she was somewhat puzzled by its significance.

"I knew such things happened during the last century," she said, "but I didn't know there were any Ku Klux Klanners in Richmond now. It looks like a KKK act."

Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1

Cross Fired Near Suffolk Stirs Probe

Burning Second in Past Week

Virginia's second cross-burning episode of the week was under investigation yesterday by Nansemond County law enforcement officers.

A six-foot wooden cross was burned Friday night in front of a store at Driver, owned by Alvester Drake, a Negro.

The incident followed by less than 24 hours, the burning of a cross on the front lawn of J. M. Sweat, a Negro schoolteacher living in a predominantly white residential section of Richmond.

J. Frank Culpepper, Nansemond County sheriff said "only a few persons" apparently set up and lit the cross near Drake's store. He said none of the participants were hooded or masked, and that there was no ceremony.

Culpepper said the cross-burners arrived at the store in two automobiles and left immediately after setting the flames.

Two Different Groups

He could ascribe no reason for the incident. But he said he believed the participants were not the same group which last December 11 burned a cross on the property of County Fire Warden N. H. Bradshaw. All of the members of that group, he pointed out, were hooded and masked, and there was a ceremony attendant upon the burning.

Meantime, Richmond police continued an investigation into the burning of a five-foot cross in the Sweat front yard. Police Chief O. D. Garton said Saturday his department was sparing no effort "to apprehend the guilty parties."

If found, he said the participants could be charged with violating city fire ordinances, trespassing and disturbing the peace.

Sweat was not at home when the cross-burning occurred in the North Side community of Barton Heights.

Police extinguished the fire after the cross had been burning about 10 minutes.

Sweat said he "had no idea who was responsible."

The cross burnings at Driver and Richmond brought to eight the number which have occurred in Virginia during the past year. Six of the incidents have occurred in Nansemond County.

Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents.

Some sources have expressed the opinion that the cross burnings, especially the Whaleyville affair, were Ku Klux Klan activities.

But in Atlanta, KKK Grand Dragon Samuel Green said yesterday that the Klan "played no part" in the incidents and had no member groups in Virginia.

"Un-American Act"

The latest Richmond cross burning was denounced last night by W.H. Reavis, treasurer of the Progressive party of Richmond, as "an un-American act, designed to intimidate Negroes from seeking their rights as citizens."

"The Klan elements who participated in and inspired this terroristic act fear the growing movement of the Negro people for their full constitutional rights and for an end to the un-American practices of discrimination and segregation," Reavis' statement said.

It added that "the Klan and Klan-minded groups are frightened at the increased political activity of the Negroes in Richmond, together with labor and other white progressives."

The first Richmond cross burning occurred on March 23 of last year on the lawn of the Robert Fulton School.

Onlookers in the vicinity reported seeing persons clad in sheets running back and forth behind the burning cross during the 20 minutes that it was afire early that night.

Police said school property was not damaged, and they could give no reason for the affair.

No one was on the school property when the officers arrived. Police later said they thought the cross burning was a prank.

Meanwhile, Alice Burke, State chairman of the Virginia Communist party, issued this statement here last night:

"Our city was immeasurably harmed when a cross was burned on the lawn of one of Richmond's citizens." (She referred to the most recent incident).

Richmond Times-Dispatch, Apr. 14, 1950, at 6.

Huge Cross Is Burned on Hill Just South of Covington

Special to the Times-Dispatch

COVINGTON, VA., April 13 – a huge cross reminiscent of the Ku Klux Klan days, was burned atop a hill just south of Covington late last night.

Hugh D. Little of Suffolk one of nine men questioned by Sheriff W. E. Henderson, assumed responsibility for the burning the sheriff said, and explained that the cross was a part of an initiation ceremony of the Knights of the Kavaliers, a secret organization charted by the State Corporation Commission in 1948.

Sheriff Henderson said Little exhibited the charter of the organization, showing himself, John R. Hampton, of Suffolk; Ralph E. Hampton of Suffolk; and James T. Lewis, of Norfolk, as the organizers.

There was no show of violence in connection with the cross-burning. Sheriff Henderson said. He added that Little gave him a signed statement in which he admitted full responsibility for the act.

Henderson said he investigated the incident on the strength of an anonymous telephone call and intercepted nine men in four cars about 500 yards from the burned cross. Little and John R. Hampton were in the first of the four cars, he said, and readily admitted their identities.

The men in the other three cars, Henderson said, were believed to be local citizens but he was unable to identify them. They would not discuss the matter, leaving Little to do the talking, he added.

After questioning the men on the road, Henderson said he went to the scene and found the charred cross lying on the ground partially covered with dirt but still burning. He extinguished the flames and took the cross to his office.

The sheriff said the cross was constructed of sawed lumber two by five inches. The cross-bar, he said, was about six fee long and the upright bar about 12 feet long.

A similar cross-burning took place near Covington July 2 of last year, but the scene of that incident was on the opposite side of town from the burning last night.

Investigation Planned

SUFFOLK, April 13, – The Nansemond Commonwealth's Attorney Paul L. Everett said today his office plans to investigate a cross burning at Driver last night to see if there had been any violation of the law. Deputy Sheriff, C. F. Mansey described the cross as 18 feet high and eight feet wide.

Richmond Times – Dispatch, Feb. 26, 1951, at 4

Cross Burned At Manakin; Third in Area

Men Flee Negro Home In Auto, Firing Pistol

MANAKIN, VA. Feb. 25 – A six-foot cross was burned in front of the home of a Negro family in the center of this small Goochland community shortly before 10 o'clock Saturday night.

It was the third such cross to be burned in this vicinity within the past week, authorities said. Two of the crosses were burned in Goochland County and the third in the western section of Henrico County.

In all three cases, the crosses were burned in front of the homes of Negro tavern owners. Law enforcement authorities were unable to give any reason for the burnings.

The latest cross was burned in front of the home of John B. Pittman, owner of a small tavern on State Route 6, about 11 miles west of Richmond and 10 miles east of Goochland Courthouse.

Five Shots Fired

Pittman said he heard a commotion in front of his home Saturday night. When he went to the front door, the cross was blazing. He said five or six white men were running away. They jumped into an automobile parked near by and drove away in the direction of Goochland Courthouse, he said.

Pittman said one of the men stuck a pistol out of a window of the automobile and fired five times.

"I can think of no reason why tehy [sic] picked out me to burn a cross," Pittman said. "I have run a business in the county for years and have no enemies as far as I know."

Deputy Sheriff John Amos said a similar cross was burned Saturday, February 17, in front of Ida Mickie's home on Maidens Road, several miles from the Pittman residence.

There had been a fight at the Mickie Tavern the night before and several persons had been arrested, Amos said. "We thought it was some of those arrested trying to get revenge on the woman but with the burning last night it puts a different light on the matter," he said.

Pranksters Suspected

Amos said no one saw the cross being placed at the Mickie place. Several shots were fired as the automobile drove away.

The crosses were about six feet high and made out of small strips of wood like bean holders; Amos said. The crosses were wrapped in burlap bagging, which had been soaked in oil.

Goochland County Sheriff Joe Powers said last night he and Amos were working on the two cases. He said it was his opinion that the crosses were the work of "bad boys" in the county and they were "acts of vandalism."

Commonwealth's Attorney J. C. Knibb was out of the county for the weekend.

White persons living in the vicinity were questioned by a reporter, but none could give any information as to why the crosses had been burned.

In the Henrico County case, the cross was burned in front of the Broadway Inn, a Negro tavern on Broad Street Road about five miles west of Richmond, also on Saturday night, February 17.

Henrico County Policeman R. H. Beck, who investigated the complaint said he thought it was the work of pranksters. He listed "vandalism" on his report.

Henrico County Police Chief Wilmer Hedrick said last night he had thought the cross burned in his county was an act of vandalism. However, he said in view of the other two burnings, he planned to confer with Goochland authorities for further investigation.

Commonwealth's Attorney H. M. Ratcliffe said last night he had not heard of the burning but that he would take action if the persons responsible were caught.

Richmond News Leader, Apr. 14, 1951, at 1

Cross Is Burned At Reedville Home

Special to The News Leader

REEDVILLE, April 14 – A cross was burned here last night in front of the home of R. L. Walker, local fish net repairman.

The family said today they suspected the cross burning was the result of the family's prosecution of five juveniles recently. The youths were punished Thursday in Juvenile Court for shooting firecrackers at the Walker's home, Walker's daughter said.

Investigation of the cross-burning is being conducted by the Northumberland County sheriff.

Richmond Times-Dispatch, Feb. 6, 1952, at 7

'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments

Governor Battle said yesterday that Virginia "might well consider passing legislation" to restrict the activities of the Ku Klux Klan.

He took his cue from the reports that the Klan, long considered dead in Virginia, is being revitalized in Richmond. A prominent Southern Ku-Kluxer has confirmed a report that attempts are being made to establish a klavern in Richmond.

[In the hooded organization, a klavern is the name given to local Ku Klux Klan clubs.]

Asked for a comment on the report that the Klan is to be revived in Virginia, the Governor said: "My reaction is not very happy."

He said that he did not know of any Virginia statutes which prohibit the wearing of masks in public and added, "If the Klan, as presently constituted, is coming to Virginia, we might very well consider passing such legislation."

By "such legislation" the Governor meant a law similar to those passed by other States where the Klan has been reactivated.

Meanwhile, Dr. J. M. Tinsley, local president of the National Association for the Advancement of Colored People, said he would call on the Federal Bureau of Investigation today to take immediate action.

Yesterday, FBI officials here said they had no word from Dr. Tinsley or other NAACP officials and declined to comment on the Klan.

"There is nothing more important than the FBI should devote its activities to at this time in Virginia than to apprehend and expose the people who are organizing and joining the Ku Klux Klan," Dr. Tinsley said.

Bill Hendrix, of Tallahassee, Fla., grand dragon of one division of the Klan, confirmed a report Monday that he was in Richmond "a couple of weeks ago" and plans a return visit "the first Saturday in March." He refused to identify his Richmond contacts and where the meeting will be held when he makes a return visit.

Foster on Guard

Richmond's safety director, Richard R. Foster, said he had heard nothing on the reactivation of the Klan, but "will keep a close watch on it." He added that he would have to wait for further developments.

In Leesville, S. C., Thomas L. Hamilton, grand dragon of the Carolinas Ku Klux Klan said yesterday he has been chosen imperial wizard of the klans in the Eastern United States.

During a telephone interview with The Times-Dispatch, Hendrix said that most of Ku Klux Klan recruiting spade work in Virginia was being done by his ally, Hamilton. Hendrix admitted that he has not been too active in the Klan's organization work of late.

Advancement "News"

Hamilton's advancement in rank, however, was "news" to an Atlanta spokesman for Klan organizations claiming to cover "the 48 States." "I hadn't heard about it," Charles H. Klein, executive secretary of the Association of Georgia Klans and the Associated Klans of America, reported.

"He must be worried," Klein added. "He must need publicity."

Hamilton and Grand Dragon Bill Hendrix, of the Florida Klan, have been working together for some time, according to the Associated Press, but both have been at outs with the Georgia Klan.

Hamilton's new post is comparable to that held by the late Sam Green, of Atlanta, after whose death the Klan split up into State and factional groups. Before the Atlantan's death, Hamilton was a constant companion to Green.

Richmond Times-Dispatch, Feb. 10, 1952, § 2 at 1

Governor Backs Curb On Ku Klux Activities

Battle Confirms Experts Working To Draw Up Bill

By James Latimer

A bill aimed at unmasking any Ku Kluxers who try to raise their sheeted heads in Virginia may be added to Governor Battle's legislative program in the next few days.

The Governor yesterday confirmed a report that he had set legislative drafting experts to work on the problem of what legislation might be devised to checkmate the Klan.

Earlier last week a Florida KKK "grand dragon," Bill Hendrix, of Tallahassee, said a "klavern" is being formed in Richmond – a "klavern" being Ku Kluxese for local chapter or unit of the hooded hoodlums.

Governor Battle's legislative researches are delving first into existing Virginia laws to see what statutes might already be on the books for use in controlling the Klan. None had been found yesterday, and it appeared a new law would be needed.

Antimasking Law

Any such legislation probably will take the form of antimasking laws which some other States have adopted.

The Governor told reporters the State couldn't ban secret organizations as such, but "we can condemn organizations in which people are ashamed to permit their faces to be shown and their membership to be known."

Apart from the Richmond klavern-forming, there have been unconfirmed reports the Kluxers are trying to organize elsewhere in the Old Dominion.

* * *

Richmond News Leader, Feb. 23, 1952, at 1

Name Rider Approved By House

* * *

2. The Senate approved and sent to the House the Stephens anti-Ku Klux Klan bill. Designed to outlaw masks worn in public, the bill was amended before passage to ban the burning of crosses and other similar evidences of terrorism.

* * *

Richmond Times-Dispatch, Mar. 8, 1952, at 5

Bill to Curb KKK Passed By the House

Action Is Taken Without Debate

The Senate bill to curb activities of the Ku Klux Klan in Virginia was passed yesterday without debate in the House of Delegates.

The bill now goes to Governor Battle. He recommended the measure offered by Senator A. E. S. Stephens, of Smithfield.

The bill would prohibit the wearing of masks and the burning of crosses on public property, and on private property without the consent of the owner or occupant.

Delegate John B. Boatwright, of Buckingham County, was the lone dissenter in the House. The bill was presented to the House by a former FBI agent, Delegate Mills E. Godwin, of Suffolk.

Recently, a KKK official predicted an effort would be made to organize klaverns in Virginia. The official said the first effort would come this Spring in the Richmond area.

"Very Salutary Effect"

Godwin said law and order in the State were impossible if organized groups could create fear by intimidation. He predicted the bill would have "a very salutary effect" by giving the police a method to control "activities that tend to incite resentment."

"This bill is distinctively in the public interest, and I urge the House to pass it," the Suffolk Delegate said.

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No. 01-1107

Supreme Court, U.S.
F I L E D
APR 23 2002
CLERK

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

BARRY ELTON BLACK; RICHARD J. ELLIOTT; JONATHAN O'MARA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case presents a First Amendment challenge to Virginia's cross-burning statute, which reads:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Va. Code Ann. § 18.2-423 (Michie 1996).

The prosecutions under this statute of Respondents Richard J. Elliott and Jonathan O'Mara arose from the same incident in the City of Virginia Beach on May 2, 1998. James Jubilee, an African-American, was a neighbor of Elliott's. Jubilee complained to Elliot's father about the discharge of firearms in Elliott's backyard. After discussing Jubilee's complaint with O'Mara and a third person, David Targee, at a party at Targee's home, Elliott, O'Mara, and Targee hastily constructed a crude wooden cross in Targee's garage. They went to Jubillee's home, planted the cross in his back yard, and attempted to light the cross. Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to

commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross-burning law. Elliott was also charged with attempted cross-burning and conspiracy to commit cross-burning. Upon his plea of not guilty, a jury found him guilty of attempted cross-burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500. O'Mara and Elliott appealed. A panel of the Virginia Court of Appeals affirmed the convictions, holding that the cross-burning statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence." *O'Mara v. Commonwealth*, 33 Va.App. 525, 536, 535 S.E.2d 175, 181 (2000). O'Mara's and Elliott's petition for rehearing en banc was refused.

Respondent Barry Elton Black organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County, Virginia. The Klan rally was conducted on rural property with the permission of the landowner, who also participated in the rally. No one other than the participants in the rally was present on the property. The County Sheriff and Deputy monitored the rally from an adjacent highway, to be sure that it would not get out of hand. A neighbor watched the rally from her porch. Several vehicles passed by the rally on the highway, and the occupants of one vehicle, an African-American family briefly slowed to see what was going on, and then sped away. Following Ku Klux Klan traditions, the rally was largely comprised of hate-filled racial, ethnic, and religious bigotry. At the

height of the rally a cross a cross approximately 25 to 30 feet tall was ignited, while the hymn *Amazing Grace* was played. The sight of the burning cross was visible from the highway.

Black was indicted for violating Virginia's cross-burning statute. He moved for dismissal of the indictment on the grounds that the statute was unconstitutional. The trial court denied Black's motion and, upon conviction by a jury, Black was sentenced to pay a fine of $2500. Black's conviction was affirmed by the another panel of the Virginia Court of Appeals in a one-sentence order, relying on the reasons the prior panel of the Court of Appeals had articulated in the Elliott and O'Mara cases.

The Supreme Court of Virginia heard oral argument in all three cases on the same day, and in a consolidated opinion, reversed all three convictions in a 4-3 decision, holding that the Virginia cross-burning statute was unconstitutional on its face.[1] *Black v. Commonwealth of Virginia*, 262 Va. 764, 553 S.E.2d 738 (2001), App.1.[2] The Supreme Court of Virginia held that the statute engaged in content-based discrimination impermissible under the First Amendment, relying principally on this Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

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[1]Elliott and O'Mara brought only a facial challenge to the cross-burning statute. Black challenged the cross-burning statute both on its face and as applied.

[2]Pinpoint page citations to the opinion of the *Black* opinion throughout this Brief are made to the Appendix appropriate Appendix page in the Petition for *Certiorari*.

REASONS FOR DENYING THE PETITION

A. The Competing Lower Court Interpretations of *R.A.V.*

In *R.A.V.* this Court struck down an ordinance of St. Paul Minnesota that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380. This Court held that "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 391.

Two different understandings of the meaning of *R.A.V. v. City of St. Paul* have surfaced among lower court jurists since this Court's decision in the case. The "strong" version of *R.A.V.* treats the decision as essentially an absolute bar against any statute that singles out any symbol or group of symbols for special proscription or penalty. Under the strong reading of *R.A.V.*, no cross-burning law will ever survive constitutional attack, precisely and simply because it is a cross-burning law. The strong version of *R.A.V.* will

permit the *act* of cross-burning to be prosecuted if the law is content-neutral. So too, the strong version will permit laws that punish bias-motivated crimes by singling out for special proscription or penalty acts motivated by biased intent, such as racism or religious bigotry. Correspondingly, the strong version of *R.A.V.* will permit symbolic expression such as cross-burning to be introduced as *evidence* to establish invidious intent. What the strong reading of *R.A.V.* will never permit, however, is the penalizing of symbolic expression, such as cross-burning, *as such*. *See, e.g.*,, *Black v. Commonwealth*, App. 18 ("A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment."); *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993) (applying *R.A.V.* to strike down a cross-burning law, stating: "Like the Minnesota statute, section 16-7-120 does not completely prohibit the use of fighting words; rather, it prevents only the use of those fighting words symbolically conveyed by burning a cross. The government may not selectively limit speech that communicates, as does a burning cross, messages of racial or religious intolerance.").

In contrast, the "weak" interpretation of *R.A.V.* treats that decision as a far more permeable holding. The weak version will permit a cross-burning law in which the prohibition of cross-burning is tied to some other constitutionally unprotected conduct, such as a "threat" or act of "intimidation" or use of "fighting words" as long as that proscription is itself content-neutral. The weak version treats this Court's condemnation of content-based and viewpoint-based discrimination is *R.A.V.* as residing in the language of

the St. Paul ordinance requiring that the symbolic speech (such as burning a cross) be of the type "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *See State v. T.B.D.*, 656 So.2d 479, 481-82 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996). A law that does not include any such list of forbidden messages is content-neutral, under the weak version, even though it may be limited to symbolic acts such as burning crosses. The weak version, however, posits that a properly drawn cross-burning statute can be defended under one or more of the "exceptions" for content-based regulation recognized in *R.A.V.* Cases adopting the weak version of *R.A.V.* frequently claim, as does the Commonwealth in its Petition for *Certiorari*, that *R.A.V.* contained exactly three such stylized doctrinal "exemptions." *See In re Steven S.*, 31 Cal. Rptr.2d 644 (Cal. App. 1994), *review denied* 1994 Cal. LEXIS 5185 (Cal. 1994). Relying on various passages within the *R.A.V.* opinion, these three exceptions are typically articulated as: (1) forms of content discrimination in which "the basis for the content discrimination consists of the very reason the entire class of speech at issue is proscribable," *R.A.V.* 505 U.S. at 387; (2) content-based discrimination against a subclass associated with particular "secondary effects" of the speech, *id.* at 387; and (3) situations where "the nature of the content discrimination is such that there is no realistic

possibility that suppression of ideas is afoot." *Id.* at 390.[3]

These two differing views of the meaning of *R.A.V.* are vividly represented by the divisions between the majority and dissenting opinions in the Supreme Court of Virginia below. More significantly, the differences are observable in the conflicts posed by some--though not all--of the cases cited by the Commonwealth in its Petition for *Certiorari*.

B. The Supreme Court of Virginia Correctly Interpreted and Applied *R.A.V.*

In their constitutional challenge to the Virginia cross-burning statute, Elliott, O'Mara, and Black maintained that the principal constitutional defect in the law was not content-discrimination or viewpoint-discrimination resting in either the identity of the speaker, the identity of the alleged victims, or in any specific message of bigotry, but rather rested blatantly and, for First Amendment purposes, sufficiently, in the fact that the law was limited to expression arising from one symbol, and one symbol only: the burning cross.

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[3]Respondents do not accept this understanding of *R.A.V.* as sound. This Court's ruling in *R.A.V.* cannot be reduced to a mechanical outline, with a general rule against content discrimination qualified by three well-defined exceptions. Moreover, as set forth in Respondent's argument later in this Brief, the "exceptions" identified by the Commonwealth and those judicial decisions sympathetic to its position interpret these would-be exceptions in a manner that cannot be squared with the larger holding or rationale of *R.A.V.* Suffice it to say at this juncture, however, that decisions from other jurisdictions that squarely conflict with the ruling of the Supreme Court of Virginia below tend to rely on one or more of these perceived exceptions.

Out of all the objects in the world that might be set on fire, the law selected only a burning cross for unique treatment. At the highest level of abstraction a cross is an object or symbol of a particular shape: a vertical bar traversed by a horizontal bar. There certainly is nothing in this geometric configuration of the vertical and horizontal that carries any peculiarly dangerous potency. It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames.

In holding the Virginia cross-burning statute void, the Supreme Court of Virginia rejected every argument advanced by the Commonwealth in defense of the law. The Supreme Court of Virginia rebuffed the Commonwealth's claim that the statute was content-neutral because it applied to any person who burned a cross for the purpose of intimidation, and was not limited to any particular group (such as the Ku Klux Klan) or to any specific message (such as racism or anti-Semitism.). In rejecting the Commonwealth's claim, the Court noted that the law had its origins in concern over the activity of the Klan, including a series of cross-burning incidents by the Klan in the early 1950s. *Black v. Commonwealth*, App. 11-12 ("While not specifically stating that 'race, color, creed, religion or gender' is the subject of the proscription, the absence of such language in the Virginia statute does not mask the motivating purpose behind the statutory prohibition of cross-burning.") The Commonwealth, the Court noted, had relied on this history of cross-burning, and the relationship between these cross-burnings and racial intimidation and violence, as a justification for the legislative judgment that cross-burning is an especially potent and dangerous mode of intimidation. *Id.*, App.

14. The Commonwealth's submission that society's historical experience with cross-burning justified singling the practice out for special treatment, however, was in tension with its claim that the law was content-neutral. This tension was picked up by the Supreme Court of Virginia, which succinctly observed that "[t]he Commonwealth cannot have it both ways." *Id.*, App. 14.

The Court held that Virginia's cross-burning law could not be sustained merely because it was limited to acts of intentional intimidation. While the Commonwealth could certainly attack bigotry and violence through neutral laws dealing with threats, intimidation, or fighting words, it could not resort to the short cut of attacking only the content of symbolic expression. *Id.*, App. 11-14. *See also Watts v. United States*, 394 U.S. 705 (1969) (interpreting the "true threat" First Amendment doctrine.) The Court held that the "secondary effects" doctrine could not be invoked to sustain the law, because the law was not a neutral statute targeting harms unrelated to the content of the message conveyed by cross-burning, but rather was a statute in which the targeted harm--intimidation--arose entirely from the communicative impact of burning a cross. *Id.* App. 16.

Lastly, the Court properly held, the constitutional infirmities of the law were exacerbated by the statute's prima facie evidence provision. The mere burning of a cross, with no other extrinsic evidence of an intent to intimidate, is enough to subject a speaker to arrest, prosecution, and conviction under the statute. Although the state bears the ultimate burden of proving an intent to intimidate, the fact remains that the burning of a cross by itself creates a

statutory presumption, albeit rebuttable, of such intent. This regime chills expression, the Court correctly held, sweeping within its ambit both protected and unprotected speech, and as such was unconstitutionally overbroad. *Id.* App. 16-17.

C. Not All the Lower Court Decisions Cited by the Commonwealth to Support Its Claim of Conflict Are in Fact in Direct Conflict with the Opinion of the Supreme Court of Virginia Below

The Respondents do not dispute the claim advanced by the Commonwealth of Virginia or its supporting *amici*, the states of Arizona, California, Georgia, Kansas, Massachusetts, Missouri, Oklahoma, Utah, and Washington, that conflict exists in the decisional law of various lower courts in prosecutions involving defendants who engaged in cross-burning. Nor do respondents dispute the philosophical intensity or social significance of the conflict. The line that separates violent and hateful rhetoric from violent and hateful criminal conduct is central to our constitutional democracy, especially in times permeated with racial and religious tension and a heightened national sensitivity to the horrors of terrorism. Respondents do, however, dispute the claimed breadth of the conflict in the decisional law.

The Commonwealth maintains that decisions in three sister states, South Carolina, Maryland, and New Jersey, are consistent with the ruling of Supreme Court of Virginia below in *Black v. Commonwealth*.[4] Respondents agree.

The Commonwealth maintains that decisions in three other sister states, Florida, California, and Washington, as well as decisions in two federal circuits, the Seventh Circuit and the Eighth Circuit, are in conflict with the ruling of Supreme Court of Virginia. Respondents disagree.

Decisions in two states, Florida and California, are indeed in irreconcilable conflict with the decision in Virginia. The decision of the Supreme Court of Washington, however, does not pose a bona fide conflict. The decisions of the United States Court of Appeals for the Seventh and Eighth Circuits can arguably be reconciled with at least the holding of the Supreme Court of Virginia below. Respondents do concede that some of the more far-reaching language and rationales of those federal decisions are at least in tension with the rationales advanced by the Supreme Court of Virginia.

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[4]*See State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993) (overturning cross-burning conviction on the authority of *R.A.V.*); *State v. Sheldon*, 629 A.2d 753 (1993) (same); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (same). Respondents agree with the Commonwealth that these decisions are consistent with the decision of the Supreme Court of Virginia below.

1. Florida

The conflict between the decision below and the decision of the Florida Supreme Court in *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996), is direct and irreconcilable. In *T.B.D.*, a minor was charged with erecting a flaming cross on the property of Atef Abdul-Nour in violation of Florida's anti-cross-burning law, part of a Florida criminal code Chapter entitled "Criminal Anarchy, Treason, and Other Crimes Against Public Order." Chapter 876, Fla. Stat. (1993).[5] The Florida statute singled out for punishment one particular communicative mode and message, the burning of a cross, but was not otherwise tied to the identity of either speakers or recipients, or the motivation of the cross-burner. The defendant in *T.B.D.* argued that this Court's decision in *R.A.V.* rendered the Florida statute unconstitutional on its face, because it was tainted by content-discrimination in the same sense as the ordinance struck down by this Court in *R.A.V.* The Florida Supreme Court disagreed,

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[5] The statute at issue in *T.B.D.*, section 876.18, Fla. Stat. (1993) read in pertinent part:

> Placing burning or flaming cross on property of another. -- It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree . . . .

distinguishing *R.A.V.* The core of the Florida Supreme Court's analysis was that the content and viewpoint discrimination found unconstitutional in *R.A.V.* inured not in the fact that the ordinance mentioned specific symbols, such as swastikas or crosses, but rather in the fact that the ordinance "played favorites," by treating certain viewpoints within the marketplace of ideas less favorably than others:

> The United States Supreme Court held the ordinance invalid because it played favorites: Rather than proscribing certain types of "fighting words" across the board, the ordinance prohibited such words only in special cases, *i.e.*, only where the words may offend due to "race, color, creed, religion or gender." "Such a restriction would open the door to government favoritism and protectionism of certain topics and viewpoints and implicit censorship of disfavored ones. . . ."

State v. T.B.D., 656 So.2d at 481, *quoting* St. Paul, Minn.Legis.Code §§ 292.02 (1990), and *State v. Stalder*, 630 So.2d 1072, 1075 (Fla.1994). The Florida Supreme Court reasoned that the Florida statute was consistent with *R.A.V.* "because the Florida prohibition is 'not limited to [any] favored topics,' but rather cuts across the board evenly." 656 So.2d at 481. In the view of the Florida Supreme Court, it was enough to satisfy First Amendment requirements that no mention was made in the Florida law of "any special topic such as race, color, creed, religion or gender." *Id.* While the law did

single out cross-burning, the Florida Supreme Court, like the dissenters in the Virginia Supreme Court below, appeared to see this not as content or viewpoint discrimination, but rather as a "targeted activity" that was "proscribed because it is one of the most virulent forms of 'threats of violence' and 'fighting words' and has a tremendous propensity to produce terror and violence." *Id.* *See also* Black v. Commonwealth, Hassell, J., dissenting ("[T]he purpose of the Virginia statute . . .is not to suppress repugnant ideas, but rather to proscribe physical acts intended to inflict bodily harm upon the victims of such acts.").

Justice Overton, the lone dissenter in the Florida Supreme Court, saw the matter differently, writing that "[w]hile I would personally prefer to uphold the constitutionality of this statute and to prohibit through this statute the type of conduct at issue, I find that the United States Supreme Court's decision in *R.A.V. v. City of St. Paul* eliminates any choice that I have in this matter. *State v. T.B.D.*, 656 So.2d at 482 (Overton, J., dissenting)(internal citation omitted).

2. California

In *In re Steven S.*, 31 Cal.Rptr.2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994) a California intermediate appellate court sustained the constitutionality of California's cross-burning law.[6] *See*

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[6]The California statute, § 11411 of the California Penal Code, read in pertinent part:

> (a) Any person who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property shall be punished by imprisonment in the county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the county jail not to exceed one year, by a fine not to exceed fifteen thousand dollars ($15,000), or by both the fine and imprisonment for any subsequent conviction.
>
> (b) Any person who engages in a pattern of conduct for the purpose of terrorizing the owner or occupant of private property or in reckless disregard of terrorizing the owner or occupant of that private property, by placing or displaying a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the private property of another on two or more occasions, shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine not to exceed ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment. A violation of this subdivision shall not constitute felonious conduct for purposes of Section 186.22.

also People v. Carr, 97 Cal.Rptr.2d 143 (Cal. App. 2000) (applying California's cross-burning law to sustain a conviction for cross-burning).

The ruling of the California intermediate appellate court in *In re Steven S.* does conflict, at least in substantial part, with the decision below of the Supreme Court of Virginia. Unlike the Virginia statute, the California statute required that the act of cross-burning take place, unauthorized, on the property of

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(c) Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who burns, desecrates, or destroys a cross or other religious symbol, knowing it to be a religious symbol, on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends or works at the school or who is otherwise associated with the school, shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed fifteen thousand dollars ($15,000), or by both the fine and imprisonment for any subsequent conviction.

(d) As used in this section, "terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety.

another.[7] Nevertheless, at its heart the California ruling embraced a view later advanced by the Commonwealth of Virginia but rejected by the Court below, that an intimidation statute that singles out cross-burning for special prohibition is not content or viewpoint discrimination within the meaning of *R.A.V.* The California court took the position that burning a cross on the property of another inherently causes terror and intimidation, and thus constitutes unprotected conduct under both the "true threat" and "fighting words" doctrines. *In re Steven S.*, 31 Cal.Rptr.2d at 647. ("But an *unauthorized* cross burning *on another person's property*, which we shall call 'malicious' cross burning for shorthand purposes . . .does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm."). The California court reasoned that the "true threat" doctrine removes from First Amendment protection threats of violence in which a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm. *Id. citing Watts v. United States* 394 U.S. 705, 707-708 (1969); *United States v. Orozco-Santillan* 903 F.2d 1262, 1265-1266 (9th Cir. 1990). Similarly, the California court understood the "fighting words" doctrine as permitting punishment for statements "'which by their very utterance inflict injury or tend to

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[7]Thus the California statute would have reached the conduct of Respondents Elliott and O'Mara in the case at bar, who burned a cross without authorization on the property of another, but not the conduct of Respondent Black, who burned a cross on the property of another with the permission of that property owner.

incite an immediate breach of the peace.'" *In re Steven S.*, 31 Cal.Rptr.2d at 647, *quoting Chaplinsky v. New Hampshire* 315 U.S. 568, 572 (1942).

The California court conceded that both the true threat and fighting words doctrines were limited by the rule announced by this Court in *R.A.V.* Nevertheless, the California court interpreted *R.A.V.* as not barring content discrimination if a law falls within one or more of the "exceptions" noted in *R.A.V.* As previously noted in this Brief these three purported exceptions involve (1) forms of content discrimination in which the basis for the content discrimination consists of the very reason the entire class of speech at issue is proscribable; (2) content-based discrimination against a subclass associated with particular "secondary effects" of the speech, and (3) situations where the nature of the content discrimination is such that there is no realistic possibility that suppression of ideas is afoot. *In re Steven S.*, 31 Cal.Rptr.2d at 651. Applying these exceptions, the California court ruled that although the California statute singled out cross-burning for singular proscription, it was still constitutional, because it fell within all three *R.A.V.* exceptions. The California statute did not reach mere obnoxious speech, but speech that was actually "threatening," which was enough, in the court's view, to satisfy the first *R.A.V.* exception. Because the law was targeted at intimidation and threats, the court further reasoned, it was also justifiable under the "secondary effects" concept. Finally, the court held, there was no realistic possibility that suppression of unpopular ideas was implicated by the California statute. Rather, the court reasoned, the purpose of the law was to penalize "an act of terrorism that inflicts pain on its victim." *Id.*

California, consistent with the arguments advanced by the Commonwealth of Virginia, thus appears to embrace the position that cross-burning laws do not offend the Constitution when enacted from the altruistic motive of attacking terror and racial bigotry. As a more recent California intermediate appellate decision would candidly state, relying on *In re Steven S.*, the "the statue was designed to curtail expressive conduct which conveys the message of racial hatred." *People v. Carr*, 97 Cal.Rptr.2d at 147.

This reasoning is entirely at odds with the holding and rationale of the Supreme Court of Virginia in *Black v. Commonwealth.* Respondents submit that it is also at odds with this Court's ruling in *R.A.V.* It trivializes the import of this Court's ruling in *R.A.V.* to reduce it to a sterile rule with three loopholes so elastic that they utterly undermine the integrity of the rule. The stern ban on content and viewpoint discrimination announced in *R.A.V.* cannot be avoided by the simple expedient of tying that discrimination to some other independently proscribable form of expression, such as threats, intimidation, incitement, or fighting words. In *R.A.V.* itself, the Minnesota Supreme Court attempted to save the hate speech law at issue through a narrowing construction that purported to limit application of the law to situations in which the speech was directed to the incitement of imminent lawless action and likely to produce such action – the incitement standard, in short, of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Yet this Court held that even if the law were otherwise valid as an incitement or a fighting words law, it would still be unconstitutional, because it was infected with viewpoint discrimination. *R.A.V.*,

505 U.S. at 390-96. As this Court emphasized in *R.A.V.*, a state has ample viewpoint-neutral methods of vindicating the governmental interests at stake. *See id.* at 395-96. There is no valid governmental interest underlying cross-burning statutes that cannot be vindicated through content-neutral criminal statutes. Laws of general applicability, proscribing palpable conduct that incites or threatens physical harm, do not violate the First Amendment. Beyond that, under this Court's ruling in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), hate *crime* laws, singling out for special punishment conduct undertaken out of biased motivation, are also constitutional. The legislative objectives that animate the enactment of cross-burning statutes may be achieved without throwing the First Amendment into the fire. *See Texas v. Johnson*, 491 U.S. 397, 418 (1989).

3. Washington

Contrary to the argument advanced in Virginia's Petition for *Certiorari*, the decision of the Supreme Court of Washington in *State v. Talley*, 858 P.2d 817 (Wash. 1993) is not in genuine conflict with the decision of the Supreme Court of Virginia. In *Talley* the Supreme Court of Washington interpreted and applied a relatively complex Washington statute that contained elements of classic "hate crimes" legislation, such as provisions enhancing the penalty for otherwise punishable crimes committed out of biased motivations, as well as elements of classic hate speech laws, such as proscriptions on the certain symbolic

expression, such as cross-burning.[8] Much like the case at bar, *Talley* was a consolidated appeal arising from two different cross-burning incidents. One involved a

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[8]The Washington statute, RCW 9A.36.080, read:

(1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:

> (a) Causes physical injury to another person; or
> (b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap. However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or
> (c) Causes physical damage to or destruction of the property of another person.

(2) The following constitute per se violations of this section:

> (a) Cross burning; or
> (b) Defacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim.

(3) Malicious harassment is a class C felony.

white person's burning of a cross in his own front yard to intimidate and discourage a mixed-race family from moving in next door. A second involved a cross burned by a group of teenagers in the yard of an African American family, apparently motivated by racial ill will toward a member of that family, who was a fellow student at their high school.

The Washington statute at issue in *Talley* was principally a content-neutral law targeting "malicious harassment" in which the victim was selected on the basis of the victim's "race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap." RCW 9A.36.080 (1). To violate the statute the perpetrator had to either inflict physical injury on the victim, damage another's property, or (by words or conduct) place the victim in reasonable fear of harm to his person or property or harm to the person or property of a third person. RCW 9A.36.080(1)(a)-(c). The statute described as examples words or conduct that included, but were not limited to:

> (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap.

RCW 9A.36.080(1)(b).

Two other provisions of the Washington statute seemed to cut in somewhat different directions. The statute contained a caveat plainly aimed at protecting freedom of expression, stating that "it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person." *Id.* On the other hand, the statue also contained two *per se* violations, one of which was "[c]ross burning," and the other of which was "[d]efacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim." RCW 9A.36.080(1)(2).

The Supreme Court of Washington viewed the state statute as divisible into two conceptually distinct components. Section (1) of the law, in the court's view, was a content-neutral hate crimes law. Section (1) dealt with victim selection and with the perpetrator's biased motivation. While the law did use as examples of prohibited conduct the use of cross-burning and other traditional hate symbols, the perpetrator's use of these forms of expression did not *per se* constitute violations of the law, but instead were merely *evidence* of the perpetrator's biased victim selection or biased intent. The Supreme Court of Washington thus upheld Section (1) of the Washington statute, and in doing so anticipated this Court's own subsequent ruling in *Wisconsin v. Mitchell*, in which this Court made clear that pure hate-crime laws, which are calibrated to the

motivation of the actor, and which use hate speech merely in an evidentiary sense to establish that biased motivation, are constitutional. *Wisconsin v. Mitchell*, 508 U.S. at 488.

This aspect of the *Talley* decision does not conflict with the ruling below of the Supreme Court of Virginia, for nothing in the opinion below would preclude Virginia from enacting or enforcing a content-neutral "hate crime" law similar to that of Washington's, in which specific expressive symbols *as such* are not targeted for proscription.

The second aspect of the *Talley* decision dealt with Section (2) of the Washington statute, which made certain expressive conduct, such as cross-burning or symbols historically used to connote hatred, *per se* violations of the law. The Supreme Court of Washington did *not* uphold this element of the law, but instead struck down this part of the Washington statute, holding that it was a violation of the First Amendment principles established in *R.A.V.* Virginia in is Petition for *Certiorari* seeks to distinguish the Virginia statute from the Washington statute on the grounds that the presumption contained in the Virginia law making cross-burning prima facie evidence of an intent to intimidate is merely permissive, whereas cross-burning was rendered a *per se* violation of the Washington statute. This does articulate a difference between the two laws, but it does not place these two decisions in conflict. The most that can be said is that the Supreme Court of Virginia went beyond what the Supreme Court of Washington held in extending its understanding of the First Amendment prohibition to include even a permissive inference drawn from cross-

burning. A ruling extending a principle adopted in another jurisdiction does not create a conflict with the law of that jurisdiction. The Supreme Court of Washington did, of course, sustain Section (1) of the Washington statute, which did list cross-burning as among the examples of conduct that could be deemed "malicious harassment" undertaken out of a biased motivation. In doing so, however, the state of Washington was not sustaining a "permissive inference" similar to that contained in the Virginia statute, and the *Talley* ruling on this point does not conflict with the decision of the Supreme Court of Virginia in *Black v. Commonwealth* holding the prima facie evidence provision of the Virginia statute unconstitutional. The Washington Supreme Court made it clear that the non-exhaustive examples listed in the Washington statute, which included cross-burning, merely involved the evidentiary use of speech to establish biased intent. There is a fundamental difference between the evidentiary use of hate speech to establish the bias motivation requirement for a hate crime, and the creation of a statutory presumption–rebuttable or non-rebuttable–that certain symbols are *inherently* criminal. *See Wisconsin v. Mitchell*, 508 U.S. at 488 ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

4. The Federal Courts of Appeal

Neither federal circuit decision relied upon by the Commonwealth poses a direct conflict with the holding below. The language and rationales of those decisions, however, are at least somewhat in tension with the underlying rationales advanced by the Supreme Court of Virginia. The United States Court of Appeals for the Eighth Circuit, in *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994), sustained a prosecution under federal laws arising from the same cross-burning incident that was the subject of this Court's holding in *R.A.V.* The Eighth Circuit distinguished *R.A.V.* because the federal statutes under which the prosecutions were brought, 18 U.S.C. § 241,[9] and 42 U.S.C. § 3631,[10] were both content-neutral laws

[9]18 U.S.C. § 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, ... [they shall be guilty of an offense against the United States].

[10]42 U.S.C. § 3631 provides:

> Whoever . . . by force or threat of force willfully injuries [sic], intimidates or interferes with, or attempts to injure, intimidate or interfere with--
>
> (a) any person because of his race, color, religion, sex, handicap ... familial status ... or national origin and because he is ... occupying ... any dwelling . . .
>
> [shall be guilty of an offense against the United States].

that made no mention of cross-burning or any other form of expressive activity. Cross-burning was the method used by the defendants to engage in intimidation, but the statute under which the defendants were charged was neutral:

> The government points out that 18 U.S.C. §§ 241 and 42 U.S.C. §§ 3631 are not directed toward protected speech, but are directed only at intentional threats, intimidation, and interference with federally guaranteed rights. The government further emphasizes that the statutes punish *any* threat or intimidation, or conspiracy to threaten or to intimidate, violating the statutes regardless of the viewpoint guiding the action. This, the government contends, distinguishes prosecution under these statutes from prosecution pursuant to the St. Paul ordinance invalidated in *R.A.V.* We agree.

J.H.H., 22 F.3d at 825.

So too, in *United States v. Hayward*, 6 F.33d 1241 (7th Cir. 1993), the United State Court of Appeals for the Seventh Circuit upheld a cross-burning conviction under 42 U.S.C. § 3631, again on the ground that the statute (which is part of the Fair Housing Act, 42 U.S. C. §§ 3601-3631), was content-neutral. The Seventh Circuit in *Hayward* did discuss the indisputable reality that cross-burning is conduct imbued with well-recognized symbolic meaning in the United States. Thus the Seventh Circuit explained:

> In this case, the evidence showed that the defendants burned the crosses to tell those in the Jones household (and no doubt to anyone else who saw the burning crosses) that black people were unwelcome in Keeneyville and that association with blacks was not approved. Anyone who saw the burning crosses, especially those in the Jones household, was highly likely to understand their meaning. Indeed, a burning cross may provide different connotations to different people. . . . No doubt, the defendants wanted to *express* their dislike, even hatred, of blacks through the cross burnings. But the act of cross burning also promotes fear, intimidation, and psychological injury. Therein lies the reason cross burning, as done in this case, lacks First Amendment protection.

Hayward, 6 F.3d at 1249-1250. In this quoted passage from *Hayward*, as well as in other passing observations contained in that opinion, there are suggestions that symbolic expression resulting in "oppression" or "psychological injury" (vaguely defined) might suffice, in the judgment of the Seventh Circuit, to remove that symbolic expression from the protections of the First Amendment. Moreover, it is not clear that the federal statute interpreted in *Hayward*, or the Seventh Circuit's interpretation of that statute, would comport with a sound interpretation of *Brandenburg v. Ohio*, 395 U.S.

444 (1969). Because the Supreme Court of Virginia held the Virginia cross-burning law void on its face under the rationale of *R.A.V.*, the Court did not reach the various *Brandenberg* claims advanced by Elliott, O'Mara, and Black below. It should be emphasized, however, that nothing in the opinion of the Supreme Court of Virginia prevents the state from adopting and enforcing a *content-neutral* prohibition against hate crime, provided it meets the requirements of *Brandenburg*, and to the extend the decisions of the Eighth Circuit and Seventh Circuit understood the federal statutes before them to be content-neutral, there is no direct conflict between those decisions and the decision of the Supreme Court of Virginia below.

CONCLUSION

Under our First Amendment, it is not the action of a defendant who burns a cross that most matters, but the wording of the act under which the defendant is charged. A person who burns a cross to threaten or intimidate another may be convicted under a properly drawn statute, a statute that does not target expression. When cross-burning is used as a vehicle to express threats or intimidation, it is not constitutionally protected, *provided* that the law under which it is prosecuted is not unconstitutionally infected.

The decision of the Supreme Court of Virginia below was sound. The court conscientiously applied core First Amendment principles in unpalatable circumstances. The conflicting decisions of other jurisdictions, candidly discussed in this Brief, fail to give full resonance to the First Amendment's sweeping command forbidding the abridgement of freedom of

speech. To the extent that the Supreme Court of Virginia's interpretation of that ringing command differs from some (though not all) of the decisions of other jurisdictions, those courts, and not the Supreme Court of Virginia, are the tribunals in error.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 7 2002
CLERK

No. 01-1107

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Nothing in respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below. Petitioners and respondents agree that the lower courts are sharply divided on the constitutionality of punishment for cross burning. Moreover, respondents admit that the precedent on which the decision below is based – *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) – is ambiguous. Br. in Opp. at 4-7. Either reason is sufficient to justify review by this Court. Quite simply, this Court should grant *certiorari* to resolve the split and to provide clarification.

1. Respondents candidly acknowledge a split among state courts on the constitutionality of statutes prohibiting cross burning. Br. in Opp. at 10-11. They say that "[d]ecisions in two states, Florida and California, are indeed in irreconcilable conflict with the decision in Virginia." Br. in Opp. at 11. *See State v. T.B.D.*, 656 So.2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996); *In re Steven S.*, 31 Cal. Rptr. 2d 644 (Cal. App. 1994), *review denied*, 1994 Cal. LEXIS 5185 (Cal. 1994).[1]

---

[1] Moreover, as previously shown, the Virginia decision also conflicts with the decision in Washington. *See* Pet. at 15-19, discussing *State v. Talley*, 858 P.2d 217 (Wash. 1993). In that case, the court rejected a constitutional challenge by a defendant who had burned a cross with the intent to intimidate. Respondents try to distinguish *Talley* by noting that the statute there also covered other symbolic acts; however, *Talley* carefully reviewed the challenged statute in light of the three *R.A.V.* exceptions and found no constitutional right to engage in cross burning when the purpose is to intimidate. That is the exact opposite result of the decision below.

2. Respondents also recognize that this state conflict is exacerbated by the decisions of federal appellate courts. Respondents seek to minimize this facet of the conflict by noting that the statutes in the federal cases did not expressly mention cross burning; yet, they concede that there is "tension" between the decision below and some "language and rationales" employed by two circuits. *See United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993). It is a "tension" that cannot be reconciled. Both the Seventh and the Eighth Circuits explicitly stated that cross burning with the intent to intimidate *is not* protected speech under the First Amendment. *See J.H.H.* at 826 (drawing a distinction between cross burning "done with the specific intent to intimidate" and cross burning "done for the sole purpose of making a political statement"); *Hayward* at 1250 ("the act of cross burning also promotes fear, intimidation, and psychological injury. Therein lies the reason cross burning, as done in this case, lacks First Amendment protection").

3. Respondents also agree that the conflict among lower courts is an outgrowth of ambiguity in *R.A.V.* It is a case that can be – and has been – read in two fundamentally different ways. While the labels respondents attach to these alternative readings – "strong" and "weak" – are not the most appropriate nomenclature, respondents are not far from the mark in how they characterize the two competing schools of thought. Some state courts – including the court below – read *R.A.V.* to mean that "no cross burning law will ever survive constitutional attack, precisely and simply because it is a cross burning law." Br. in Opp. at 4. Under this approach, a cross burning ban is

unconstitutional even where – like Virginia – the law bans cross burning by *anyone* who seeks to intimidate *anyone* for *any* reason.

Other courts read *R.A.V.* more narrowly, so as to leave intact those statutes that prohibit *all* cross burning with intent to intimidate, that is to say, statutes that make *no distinctions* among perpetrators, among victims or among reasons for the intimidation. For these courts, if anyone burns a cross simply to express a political viewpoint, he remains protected by the constitution; but, if he burns a cross for the purpose of intimidation, he is liable for punishment under such a content-neutral statute.[2] This view of *R.A.V.* recognizes the reality that cross burning is often performed not to exercise constitutional rights, but to deprive others of *their* rights. *See T.B.D.*, 656 So.2d at 482 ("Few things can chill free expression and association to the bone like . . . a fiery cross in the yard").

---

[2] Respondents are correct when they suggest that the Virginia cross burning law was enacted from the motive of "attacking terror". Br. in Opp. at 19. But, they miss the mark when they confuse this objective with a viewpoint-based attack on "racial bigotry." *Id.* The Commonwealth recognizes that racial bigotry, while rightly repudiated by most Virginians and most Americans, is nevertheless a viewpoint and – and such – comes within the protection of the First Amendment. It is the *intimidation* that Virginia seeks to make criminal, not the expression of any viewpoint. Moreover, as an historical matter, the Virginia statute can hardly be described as an act of political correctness. It was originally enacted in 1952, when racial segregation was still a widely held political viewpoint in Virginia, and the objective of the law was not to overcome that viewpoint, but simply to preserve law and order by combating terrorism. *See* App. 89, 100.

Although the Commonwealth believes the latter view is the correct reading of *R.A.V.*, it recognizes that reasonable judges could reach the opposite conclusion, as did a bare majority of Virginia's highest court. Until this Court resolves the ambiguity, the lower courts will continue to reach inconsistent results.

4. Respondents recognize the importance of the issue presented by this case, saying that "the line that separates violent and hateful rhetoric from violent and hateful criminal conduct is central to our constitutional democracy. . . . " Br. in Opp. at 10. Yet, it is a question on which our nation's law is in disarray. In California, Florida, Washington, and in the States covered by the Seventh and Eighth Circuits, those who burn crosses with the intent to intimidate can be subjected to criminal liability. Yet, in Maryland, New Jersey, South Carolina, and, now, Virginia, similar acts of intimidation are regarded as protected speech.[3] This irreconcilable conflict demands immediate review.

5. Moreover, respondents do not – and cannot – deny that this case provides this Court an ideal vehicle to resolve the split among lower courts and to clarify the meaning of *R.A.V.* The case presents two different types of intimidation by cross burning: one occurring on property of the victim (Pet. at 3, Virginia Beach incident), the other occurring with consent of the land owner, but in a place visible to the public (Pet. at 6, Carroll County incident). The case is uncluttered by disputes about the

[3] *See* Pet. at 20-23, discussing *State v. Sheldon*, 629 A.2d 753 (Md. 1993); *State v. Vawter*, 642 A.2d 349 (N.J. 1994); and *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993).

facts, the framing of the question presented, or other collateral issues; and, it comes at a time when the dispute among the lower courts is mature and ripe for resolution. Finally, the case comes from a sharply divided lower court whose majority and dissenting opinions "vividly represented" the "two differing views on the meaning of *R.A.V.*" Br. in Opp. at 7. The case is worthy of review by this Court. *Certiorari* should be granted.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 7, 2002

Supreme Court, U.S.
FILED
FEB 28 2002
CLERK

(2)

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BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHON O'MARA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF ARIZONA, CALIFORNIA, GEORGIA, KANSAS, MASSACHUSETTS, MISSOURI, OKLAHOMA, UTAH, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Supreme Court of Virginia in this case held that Virginia's statute making it a criminal offense to burn a cross with the intent to intimidate any person violates the First Amendment of the United States Constitution. The decision squarely conflicts with decisions of the courts of other states. It is in the states' interests that this conflict be resolved by this Court so that state policymakers who have acted, or may in the future wish to act, to ban intimidating, threatening and terrorizing conduct using symbols, such as burning crosses, may know whether such efforts are constitutionally permissible.

REASONS FOR GRANTING THE PETITION

The Petition correctly points out the conflict between the decision of the Supreme Court of Virginia and decisions by courts in Florida, Washington and California, and the conflict with the Seventh and Eighth Circuits. Petition at 14-20, 23-25. In considering whether a writ of certiorari shall be granted, this Court has indicated that an important consideration will be that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *See* SUP. CT. R. 10(b). State and federal courts are divided over the constitutionality of statutes prohibiting cross burning with the intent to intimidate or terrorize any persons. For the following reasons, *Amici* are affected by this division and believe the Petition should be granted.

I. STATES HAVE COMPELLING INTERESTS IN ADDRESSING THE REAL PROBLEMS ARISING FROM BIAS-MOTIVATED INTIMIDATION.

Numerous states have laws prohibiting threats, intimidation and terroristic acts.[1] At least fourteen states have statutes expressly referring to criminal acts involving cross burning.[2] These statutes reflect the strong

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[1] *See generally* Lu-in Wang, *Hate Crimes Law* (1999); Luddington, Annotation, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R.4th 949 (1986).

[2] California Penal Code § 11411 (burning or desecrating a cross or other religious symbol on the private property of another without authorization for the purpose of terrorizing the owner or occupant, or on the property of a primary school, junior high school or high school or the purpose of terrorizing any person who attends or works at the school); Connecticut General Statutes § 46a-58 (placing a burning cross on any public property, or on any private property without the written consent of the owner); 11 Delaware Code § 805 (burns any cross or religious symbol upon any private or public property without the express written consent of the owner and without a minimum of 48 hours notice to authorities); District of Columbia Code § 22-3312.02 (burning cross or other religious symbol on any private premises or property used for specified purposes by persons of a particular race, color, creed, or religion, or on any public property, with the intent to intimidate, threaten, abuse, or harass any other person); Florida Statutes § 876.17 (placing in a public place a burning cross); Florida Statutes § 876.18 (placing on the property of another a burning cross without first obtaining written permission of the owner or occupier of the premises); Official Code of Georgia Annotated § 16-11-37 (committing offense of terroristic act when using a burning cross with the intent to terrorize another or another's household); Idaho Code § 18-7902 (cross burning included within definition of defacing property with the intent to intimidate or harass another person because of that person's

interests of state and local governments in putting a stop to a particularly invidious sort of intimidation that go beyond their general interests in maintaining peace and order. Expressions of hate and bigotry are protected by the Constitution, but actions taken to harm, threaten, intimidate or terrorize others are not equally protected merely because they are rooted in such hate and bigotry.

Hate crimes are not in decline. In 1990, Congress enacted the Hate Crime Statistics Act, Pub.L. No. 101-275, § 1(b)(1), 104 Stat. 140 (codified at 28 U.S.C. § 534), directing the Attorney General to compile data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pursuant to the Act, the Federal Bureau of Investigation annually reports

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race, color, religion, ancestry, or national origin); Montana Code Annotated § 45-5-221 (same); North Carolina General Statutes § 14-12.12 (placing burning cross on the property of another without first obtaining written permission, or on a public street or highway with the intention of intimidating any person or persons); South Carolina Code Annotated § 16-7-120 (placing a burning cross in a public place or on the property of another without first obtaining written permission); South Dakota Codified Laws § 22-19B-2 (defining crime of defacing to include cross burning on the property of another without that person's permission); 13 Vermont Statutes Annotated § 1456 (burning cross with the intention of terrorizing or harassing a particular person or persons); Virginia Code § 18.2-423 (burning cross with the intent to intimidate); Revised Code of Washington § 9A.36.080 (in a prosecution for malicious harassment based on the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap, the burning of a cross on the property of a victim who is of African American heritage may be basis to infer intent to threaten victim unless evidence exists which explains that the person did not intend such threat).

bias-motivated crimes. Relying on the Bureau's reports, this Court has previously noted that in 1991 there were 4,558 bias-motivated offenses committed, including 1,614 incidents of intimidation, 1,301 incidents of vandalism, 796 simple assaults, 773 aggravated assaults, and 12 murders. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 n.4 (1993).

More recent data is not heartening. The Bureau reports that in 1998, a total of 7,755[3] bias-motivated criminal incidents were reported, including 3,488 incidents of intimidation, 2,549 incidents of vandalism, 1,706 simple assaults, 1,084 aggravated assaults, and 13 murders. Federal Bureau of Investigation, *Hate Crime Statistics, 1998*, at 9, Table 3 (http://www.fbi.gov/ucr/98hate.pdf). States cannot be expected to ignore the real problems associated with these acts of violence and terror.

States recognize that the expression of ideas is properly protected by the Constitution, whether expressed verbally or symbolically. There can be little question that cross burning conveys a message, albeit a message of intimidation. When a cross is burned with the intent to intimidate a particular person or group of persons, it inflicts immediate injury by subjecting the victim to fear and conveys a threat of future harm. State law should be allowed to protect the victim of such an act. *See Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[V]iolence

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[3] The Hate Crime Statistics Act was amended by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, to include those crimes motivated by a bias against persons with disabilities. The 1998 total, however, includes only 25 disability related crimes, so the 1991 and 1998 data effectively measure the same acts.

or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").

The decision below casts doubt on the ability of any state to act to protect its citizens against criminal actions intended to intimidate and terrorize them. Merely because the terror and intimidation is effectuated by using a symbol such as a burning cross does not render it any less dangerous or pernicious. The Court should grant certiorari and clarify the proper application of its precedents in this important area.

II. PROHIBITING CROSS BURNING WITH THE INTENT TO INTIMIDATE ANY PERSON DOES NOT VIOLATE THE FIRST AMENDMENT.

This case involves the confluence of several significant, and sometimes competing, societal values: the fundamental principle that preservation of peace and prevention of intimidation and terror are necessary to the maintenance of the social fabric; and the equally basic premise that freedom of speech preserves and strengthens our democratic society. *Amici* believe that a statute prohibiting cross burning with the intent to intimidate any person or group of persons adequately and reasonably reconciles these values, and should be upheld.

This Court's "cases reject the 'view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*,

508 U.S. at 484, quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (citations omitted). Intimidating, threatening and terrorizing are plainly criminal acts that can be punished.[4] The acts are not entitled to constitutional protection. Such protection should not be extended merely because the prohibited act itself might be protected if not done for the purpose of intimidation or terror.

The Virginia statute does not prohibit cross burning; it prohibits cross burning with the intent to intimidate. The lower court failed to consider the statute as a whole, and essentially applied its constitutional analysis only to the action itself, ignoring the intent requirement. This Court has recognized, however, that an intention to intimidate is a separate element of a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000) ("The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.' ").

States are not prohibited from defining intimidation, threats and terror in a way that specifies certain symbols as being particularly susceptible to being used for such purposes. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 416 (1992) (Stevens, J. concurring) ("Conduct that creates special risks or causes special harms may be prohibited by special rules."). In this case, the Virginia Supreme Court recognized that burning a circle or a square would not have the same threatening effect as burning a cross. *Black v. Commonwealth*, 553 S.E.2d 738, 745 (Va. 2001). Its conclusion, however, actually encourages statutes that do not fully inform citizens of the harm

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[4] *See, e.g.*, Ariz. Rev. Stat. § 13-1202.

sought to be prevented. The lower court opinion suggests it would approve of a statute that prohibits the burning of a circle, square or other shape with the intent to intimidate. Such a solution would pass the lower court's test, but be of little practical use. *State v. T.B.D.*, 656 So.2d 479, 482 (Fla. 1995) ("While other Florida statutes may address unauthorized cross-burnings indirectly, e.g., via trespassing or disorderly conduct bans, those restrictions fail to confront the issue head on and to affirmatively discourage the conduct."). Moreover, since the burning of geometric shapes other than crosses occurs rarely, if at all, it is not clear why a modified statute would be an improvement. Nor is it clear that such a statute would go unchallenged since cross burners would still be able to argue that they are the ones truly targeted by the revised law. States should be able to address the specific problem with specific legislation. In this case, cross burning to express ideas, however obnoxious, is not the problem. The problem addressed by the state statute is cross burning when associated with the intent to intimidate.

This Court has recognized that bias-inspired conduct may be subject to greater penalties than the same crime without the bias. *Wisconsin v. Mitchell*, 508 U.S. at 487-488. Thus, states are allowed to deal with real problems associated with bias.

> The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public

> safety and happiness." 4 W. Blackstone, Commentaries 16.

Id. at 488. Cross burning is an especially virulent, even unique, form of intimidation in American society. States should not be required to equate it with lesser forms of intimidation, such as threatened fisticuffs, merely because the symbol is also associated with hatred and bigotry. Similarly, states need not recognize acts plainly based on bias and hate, such as cross burnings, without taking steps to prevent their use in the criminal act of intimidation.

This Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992) does not require states to ignore the real law enforcement problems associated with the use of words and symbols for purposes of intimidation and terror. In *R.A.V.*, this Court observed that proscribable speech, such as "fighting words" can be regulated. The problem in *R.A.V.* was that the government only proscribed certain fighting words based on content. Such content-based regulation of even "unprotected" speech is impermissible. *R.A.V.*, 505 U.S. at 386. Just as this Court noted that "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government," *id.* at 384, states may proscribe cross burning. Under *R.A.V.*, what states may not do is ban cross burning that targets, for example, only persons of a certain race or sexual orientation, because such a ban would distinguish permissible and impermissible cross burnings based on content. "[N]on-verbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *Id.* at 385. Here, the statute

prohibits non-verbal expressive activity – cross burning – regardless of the particular viewpoint of the speaker. Just as "fighting words" can be proscribed under *Chaplinsky v. New Hampshire*, 314 U.S. 568 (1942), so too may cross burning be banned so long as the prohibition is not based on content or viewpoint. In *R.A.V.*, the ordinance banned fighting words that provoked violence only on the basis of race, color, creed, religion, or gender. Only such "disfavored subjects" of speech were banned. *Id.* at 391.

In contrast, the Virginia ordinance bans *all* cross burning that is intended to intimidate regardless of the subject or target. As such, it does not discriminate based on content. As a historical matter, it may be true that cross burners have often espoused similar viewpoints. But, those viewpoints are not elements of the statutory prohibition and are thus irrelevant for purposes of constitutional analysis. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (upholding facially-neutral law prohibiting destruction of draft cards even though, as a factual matter, most people who destroyed draft cards were protesting the Vietnam War). The lower court should therefore be reversed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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February, 2002

MOTION FILED
FEB 2 2 2002

(3)

No. 01-1107

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, and JONATHAN O'MARA,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a statute which prohibits burning a cross with the intent to intimidate violate the First Amendment?

2. When a state court finds that one paragraph of a state statute is "overbroad" under federal First Amendment precedents, may that court declare the entire statute void without considering whether the paragraph is severable?

IN THE

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COMMONWEALTH OF VIRGINIA,

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vs.

BARRY ELTON BLACK, RICHARD J. ELLIOTT,
and JONATHAN O'MARA,

Respondents.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondents have withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Virginia Supreme Court in the present case unduly limits the ability of government to protect their citizens from threats of violence and to focus limited enforcement resources on the most pernicious threats. The court's broad interpretation of *R. A. V.* v. *St. Paul* appears to limit the legislature to a choice between not punishing the worst threats or dispersing its resources by prohibiting all threats and punishing them equally. Either result would be contrary to the rights of victims and society which CJLF was formed to advance.

February, 2002

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

The present petition involves two separate incidents of cross burning. The cases were joined and decided together in the Virginia Supreme Court.

On May 2, 1998, in the City of Virginia Beach, Richard Elliott, Jonathan O'Mara, and David Targee placed a cross in the yard of James S. Jubilee and attempted to burn it. Elliott, who lived next door to Mr. Jubilee, was angry at him because he had previously complained about Elliott discharging firearms in his back yard. App. to Pet. for Cert. 2. O'Mara pleaded guilty to attempted cross burning and conspiracy while reserving the right to challenge the constitutionality of the statute on appeal. *Id.*, at 3. Elliott was convicted of the same offenses after a jury trial. *Ibid.*

The Court of Appeals affirmed both convictions in a published opinion. The court rejected the First Amendment challenge. It held that burning a cross with intent to intimidate is proscribable both as a threat and "fighting words," and that the prohibition was not "content discrimination." *O'Mara* v. *Commonwealth*, 33 Va. App. 525, 536, 535 S. E. 2d 175, 181 (2000), App. to Pet. for Cert. 57.

On August 22, 1998, Barry Black burned a cross during a Ku Klux Klan rally in Carroll County. The owner of the property was present and consented. App. to Pet. for Cert. 23 (Hassell, J., dissenting). The burning cross was visible to neighbors and a public highway and had an intimidating effect on other people. See *id.*, at 24; Pet. for Cert. 6-7. The Court of Appeals summarily affirmed Black's conviction, based on *O'Mara*, in an unpublished memorandum. App. to Pet. for Cert. 46.

The Virginia Supreme Court reversed in both cases, in a 4-3 decision. *Black* v. *Commonwealth*, 262 Va. 764, 553 S. E. 2d 738 (2001). The majority believed that the statute was "selective regulation of speech based upon content" under *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992). See 262 Va., at 771, 553 S. E. 2d, at 724, App. to Pet. for Cert. 7. The majority also held that the final paragraph of the statute rendered it "overbroad." See 262 Va., at 777-778, 553 S. E. 2d, at 745-746, App. to Pet. for Cert. 16-17.

SUMMARY OF ARGUMENT

R. A. V. v. *St. Paul* established that, although a state may prohibit some categories of speech altogether, even within those categories its ability to discriminate on the basis of content is limited. As the post-*R. A. V.* split of authority over cross-burning statutes demonstrates, the distinction between permissible and impermissible content discrimination requires further definition. The statute at issue in the present case distinguishes one kind of threat from others because this kind is worse than

others along the same dimension that makes threats proscribable in the first place.

Watts v. *United States* held that "true threats" may be proscribed, but it provided little guidance to distinguish "true threats" from "untrue threats." Because threats are an exceptionally harmful form of speech, this boundary needs to be more clearly defined.

The Virginia Supreme Court held that the statute at issue was fatally overbroad without considering whether the offending portion was severable. That would be reversible error under *Brockett* v. *Spokane Arcades, Inc.* if done by a federal court. Certiorari is appropriate to resolve whether *Brockett* applies to state courts when they consider federal constitutional attacks on state statutes.

ARGUMENT

I. *R. A. V.*'s distinction between permissible and forbidden "content discrimination" requires clarification.

R. A. V. v. *St. Paul*, 505 U. S. 377, 382-383 (1992) recognized that freedom of speech is not absolute, and that "our society . . . has permitted restrictions upon the content of speech in a few limited areas . . . ." Within these categories, the government may not engage in "content discrimination unrelated to their distinctively proscribable content." *Id.*, at 384. Content discrimination is permitted, though "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable . . . ." *Id.*, at 388.

R. A. V. was an important decision, see 4 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 20.39, p. 516 (3d ed. 1999), and like most important decisions it has generated new questions and divergent interpretations. In *Wisconsin* v. *Mitchell*, 508 U. S. 476, 482 (1993), the Wisconsin Supreme Court had interpreted *R. A. V.* to forbid a "hate crime" enhance-

ment for battery, and it was not alone in that view. See *id.*, at 483, n. 4. This interpretation was erroneous, though, and this Court unanimously reversed. See *id.*, at 490.

Cross-burning prohibitions which are more narrowly focused than the St. Paul ordinance have similarly produced divergent interpretations of *R. A. V.* The Attorney General has already demonstrated the deep split of authority on this point. Pet. for Cert. 14-25. Evidently, more clarification is needed.

Beyond any question, Elliott and O'Mara's "expressive conduct" of planting a cross in Mr. Jubilee's yard and attempting to burn it is an act the state may prohibit and punish. To apply *R. A. V.*, it is necessary to determine why this expressive conduct is proscribable and how it differs from permitted expressive conduct within the same category.

Historically, the burning cross is a threat employed by a terrorist organization to intimidate people and prevent them from exercising their civil and constitutional rights. See, *e.g.*, W. Wade, The Fiery Cross 279, 328-329 (1987). Such intimidation has long been a federal offense. See 18 U. S. C. § 245(b). A similar purpose is apparent in the statute at issue in the present case. The intent to intimidate is an element of the offense.

The difficult aspect of the question, and the one requiring this Court's attention, is how to apply *R. A. V.*'s rule of content discrimination within a proscribable category. This task requires an assessment of why this particular kind of threat is singled out from the universe of threats. This determination is part of the federal First Amendment analysis to be determined *de novo* in this Court, not an aspect of statutory construction, on which the state court's decision would be binding. See *Mitchell*, 508 U. S., at 483-484.

A state may choose to proscribe only a subset of a proscribable category which it perceives to be the worst along the same dimension that made the category proscribable in the first place. If Congress decides that threats against the President

cause greater harm to the operation of government than threats against other federal officials, it can prohibit only the former. See *R. A. V.*, 505 U. S., at 388. This is true even though the differential treatment is not politically neutral. Those who are inclined to threaten the President are likely to have different political views than those who are inclined to threaten the senior leader of the opposing political party. That disparate impact does not invalidate the statute under *R. A. V.* To borrow a phrase from a closely related area of First Amendment law, the difference is justified without reference to its impact on differing viewpoints. Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989); see also *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968) (burning draft card, "governmental interest is unrelated to the suppression of free expression").

The present statute's differential treatment of the burning cross is justified without reference to the fact that it may inhibit the expression of bigots more than it does the expression of believers in racial equality. The burning cross is singled out because its history of usage by a large, powerful terrorist organization causes it to strike a deeper fear into the hearts of the targets. This particular threat causes the same kind of harm that threats generally cause, but in greater degree. That is an entirely legitimate reason to single it out for special prohibition and punishment.

II. The proscribable category of threats requires further definition.

Several categories of speech or expressive conduct may be prohibited on the basis of their content. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382-383 (1992). Three of these relate to violence: threats, "fighting words," and advocacy of violence. See *Rankin* v. *McPherson*, 483 U. S. 378, 397 (1987) (Scalia, J., dissenting) (noting these among the categories "entitled to no First Amendment protection"). The three differ in terms of the

perpetrator and the target of the feared violence. The threat category has not been sufficiently defined.

"Fighting words" are words likely to cause the listener to assault the speaker. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573-574 (1942). In *R. A. V.*, the state court tried to shoehorn the ordinance into the "fighting words" doctrine. See 505 U. S., at 413-414 (White, J., concurring in the judgment). That was a curious choice, and it compounded the difficulties of an already problematic ordinance. Although the targets of cross burning may be moved to violence, whether out of anger or an understandable belief in the need for a pre-emptive strike, that is not the usual result or the likely reason for the prohibition.

The second category, advocacy of violence, addresses the danger of the listener perpetrating an act of violence on a third person. That category is the subject of the exacting requirements of *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969). It has no application to the present case. See *Black* v. *Commonwealth*, 262 Va. 764, 793-794, 553 S. E. 2d 738, 754-755 (2001) (Hassell, J., dissenting).

The third category is a threat of a violent act by the speaker against the listener. *Watts* v. *United States*, 394 U. S. 705 (1969) was a brief *per curiam* opinion that shed only a little light on this category. It held that the prohibition on threats against the President was constitutional, *id.*, at 707, but that a "true 'threat' " was required, at least under the statute in question. So what is a "true threat" and what is the other kind? The boundaries of this proscribable category are not well defined.

There can be little doubt that the conduct of Elliott and O'Mara lies well within the boundaries of proscribable conduct. Planting a burning cross in the target's yard is well understood to be a threat of violence, just as clearly as if they had spray-painted "We are going to lynch you" on the wall of Mr. Jubilee's home.

Black's case is more difficult. This was not a private burning, observed only by the Klan members. Cf. *Brandenburg*, 395 U. S., at 445-446. Instead, it was seen by others, with an intimidating effect, even though not directed at anyone in particular. See Pet. for Cert. 6-7. These facts are close enough to the constitutional line to make this case useful as a survey marker for mapping that line.

States can and should protect their citizens from threats of violence. Because threats inevitably involve expression, First Amendment challenges will be made. This area has not been well defined to date, and the present case is well suited to refine that definition. Legislatures need to know the boundaries so that they may draft and enact constitutional protections. In *Massachusetts* v. *Oakes*, 491 U. S. 576, 586 (1989), Justice Scalia indicated that the overbreadth doctrine is partly punitive, to provide legislatures with "incentive to stay within constitutional bounds in the first place." If the Court is going to do that, it has a responsibility to make clear where those bounds lie. Governing is not a shell game. Legislatures should not have to guess where the boundary is, and the law-abiding people of the state should not be punished when their representatives guess wrong. This is particularly true when the "expressive conduct" in question is terrorism. The peace, safety, and well-being of real people are at stake here.

III. The Virginia Supreme Court's overbreadth holding is contrary to *Brockett*.

The Virginia Supreme Court held that Virginia Code § 18.2-423 is invalid in its entirety under the federal First Amendment overbreadth doctrine because of its final paragraph. See *Black* v. *Commonwealth*, 262 Va. 764, 777, 553 S. E. 2d 738, 745-746 (2001), App to Pet. for Cert. 16-17. That paragraph reads: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

The Attorney General has explained why the state court's analysis is erroneous and worthy of review in one aspect. The court expanded the overbreadth doctrine beyond the actual prohibition of the statute to situations where a person might be erroneously charged. See Pet. for Cert. 27-29. This point is well presented and requires no further briefing at this stage.

There is another aspect of the state court's overbreadth analysis which also warrants this Court's review. Assuming for the sake of argument that there may be a problem with the final paragraph, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504-505 (1985) requires that severability be considered, with one possible caveat.

In cases coming from the lower federal courts, this Court has repeatedly held that the offending portion must be excised, rather than striking down the entire statute, unless that would be contrary to the legislative intent. See *id.*, at 505-506; *Reno* v. *ACLU*, 521 U. S. 844, 883 (1997). If this case had been decided in the federal courts, invalidation of the statute without considering severability would be clear error under *Brockett* and *Reno*.

This case, of course, does come from a state court. The *Brockett* rule is based on the principle that "a *federal* court should not extend its invalidation of a statute further than necessary to dispose of the case before it." 472 U. S., at 502 (emphasis added). The extent to which this principle is binding on state courts when they consider federal constitutional attacks on state statutes appears to be an open question, and it is an important one.

The state court in the present case unambiguously decided a federal question. It decided that the First Amendment forbids *any* enforcement of this statute because of the final paragraph, regardless of whether that paragraph is employed in the particular case and regardless of how powerful other evidence of intent to intimidate may be. The authority of state courts to judicially review state statutes on federal grounds derives from

the United States Constitution. See U. S. Const., Art. VI. The extent of that authority is a federal question, reviewable in this Court. The *Brockett* principle should apply equally to state courts when they consider federal constitutional challenges to state statutes.

Cases from state courts are different in some respects, of course. If the highest court of a state actually considers severability and decides the statute is not severable, that is a state-law question, see *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*), on which the state high court has the last word. That did not happen in this case, though, and a more obvious example of clean severability is difficult to imagine. The Virginia Legislature not only *would* have enacted the statute without the final paragraph, it actually *did*. See *Black*, 262 Va., at 771, and n. 4, 553 S. E. 2d, at 742, and n. 4, App. to Pet. for Cert. 6, and n. 4 (history of statute). If the last amendment really were unconstitutional, then it could easily be stricken, restoring the statute to its 1974 form.

The Virginia Supreme Court's decision to invalidate the entire statute constitutes a meat-axe misuse of the awesome power of judicial review. Because it was done in the name of the First Amendment, this error can and should be corrected by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

February, 2002

Respectfully submitted,

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(17)

Supreme Court, U.S.
FILED
AUG 9 2002
CLERK

No. 01-1107

In The
Supreme Court of the United States

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BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

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On Writ Of Certiorari To The Supreme Court Of Virginia

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Petition For Certiorari Filed January 24, 2002
Certiorari Granted May 28, 2002

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330 PP

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January 25, 1999	Order [denying defendant's motion to dismiss indictment]
February 22, 1999	Plea Agreement
February 25, 1999	Criminal Order
April 26, 1999	Notice of Appeal
May 6, 1999	Sentencing Order
June 6, 1999	Notice of Filing of Transcripts

In the Court of Appeals of Virginia:

April 29, 1999	Notice of Appeal
September 9, 1999	Petition for Appeal
October 3, 2000	Order and Opinion of Court [affirming trial court]
October 12, 2000	Petition for Rehearing en banc
December 13, 2000	Order [denying petition for rehearing en banc]
December 22, 2000	Notice of Appeal to the Supreme Court of Virginia

* Indicates items appearing in record, but not on clerk's docket sheet.

In the Supreme Court of Virginia:

January 8, 2001	Petition for Writ of Appeal
April 16, 2001	Order Granting Writ of Appeal
November 2, 2001	Opinion, Supreme Court of Virginia

TWENTY-SEVENTH JUDICIAL CIRCUIT
OF VIRGINIA

(LOGO)

Commonwealth of Virginia

[Name And Address Omitted In Printing]

March 18, 1999

[Filed Aug. 31, 1999]

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Re: Commonwealth of Virginia versus Barry E. Black
Case Number 98-8954

Dear Counselors:

Please be advised that I have reviewed all of the memorandums filed in this cause, both in the General District Court and in the Circuit Court, on behalf of each of the parties, and the Amiscus [sic] Curiae brief filed in support of the defendant's position in this matter, and I have given due consideration thereto.

The issue before the Court is the motion to dismiss the indictment against the defendant, Barry E. Black, upon the ground that Section 18.2-423, Code of Virginia is unconstitutional and violates the freedom of speech violations of the First Amendment of the United States Constitution, and Article I, Section 12 of the Virginia Constitution. In support of that motion, the defendant alleges as follows:

1. Section 18.2-423 discriminates on the basis of content and viewpoint and is unconstitutional under the doctrine of *R. A. V. v. City of St Paul*.

2. Section 18.2-423 does not incorporate the requirement that the speech at issue be directed to the incitement of imminent lawless action and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio*.

3. The prima facie evidence standard of Section 18.2-423 creates an unconstitutional presumption.

4. Section 18.2-423 is unconstitutionally vague and overbroad.

Rather than discuss the issues in the chronology set forth above, the court has determined that it would be appropriate to consider them, to the extent necessary, in reverse order. I have chosen this approach since the ultimate reviewing authority, the United Sates Supreme Court, has held that in construing ordinances that Court is bound by the construction given to it by the State Court. *R. A. V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381; 112 S.Ct. 2538, 2542 (1992). First it is noted for the record that the Commonwealth in this case is represented, not only by the local Commonwealth Attorney, Gregory G. Goad, but also

by John McLees, from the Office of the Attorney General of the Commonwealth of Virginia. The Court is of the opinion that the arguments set forth in the memorandums filed on behalf of the Commonwealth represents not only the official position of the Commonwealth Attorney of Carroll County, but also the Attorney General's Office of the Commonwealth of Virginia. Throughout the lower court proceedings and in the current proceedings in the Circuit Court, the Commonwealth has maintained the gravaman [sic] of the offense is intimidation in that Code Section 18.2-423[1] criminalizes on the burning of a cross "with the specific intent to intimidate", (Comm. Brief Gen. Dist. Ct., Page 3 and Comm. Brief, Cir.Ct., Page 3). In addition, in support of its response to the allegation that the section is vague and overboard its position is that "intimidation" as used in such statutes, means putting one in fear of bodily harm and further that statutory construction would require this Court to construe the word narrowly, (Comm. Supplemental Brief, Page 10).

In responding to the defendant's allegation that the prima facie provision of the statute creates an unconstitutional presumption, the Commonwealth concedes that "the 'prima facie' provision does not preclude review by a case-by-case basis of whether the defendant did in fact intend to intimidate others by his act of cross burning. On the

---

[1] Section 18.2-423, Code of Virginia, states: It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

contrary, it *requires* such review. It merely establishes that a reasonable inference of such intent can be drawn from cross-burning. The ultimate burden of persuasion of intent to intimidate always rests upon the Commonwealth. Thus, it is always open to the defendant to contest the issue of whether that intent existed, and the burden is on the Commonwealth to prove such intent, as a matter of fact, beyond a reasonable doubt, and *without regard* to whether the defendant has presented evidence on that issue or not". (Comm. Supplement Brief, Page 9).

The Commonwealth concludes by stating "It is clear from reading the law that, notwithstanding the 'prima facie' provisions, the ultimate burden is still on the Commonwealth to prove beyond a reasonable doubt that the defendant *actually* intended to intimidate others by his actions".

This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused actually intended to intimidate others by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and Article 1, Section 12 of the Virginia Constitution. The narrow application of the provisions of the above referenced section can be adequately addressed by appropriate instructions to the jury and well defined perimeters with regard to admission of evidence to the very limited and precise criminal act defined therein.

Accordingly, the defendant's Motion to Dismiss the indictment is denied. I request that Mr. Goad contact Mr. Baugh to arrange a suitable date to proceed with the trial of this case.

I commend both of you gentlemen on the time, effort and excellent memorandums which you submitted to the Court in support of your respective positions.

With best regards.

Yours very truly,

/s/ Duane E. Mink
Duane E. Mink

DEM:nc

[1] VIRGINIA: IN THE CIRCUIT COURT OF CARROLL COUNTY

COMMONWEALTH OF VIRGINIA, ***Plaintiff,*** ***vs.*** ***BARRY ELTON BLACK,*** ***Defendant.***	CR98-461

****

TRIAL BY JURY

****

Hillsville, Virginia

June 23, 1999

[2] VIRGINIA: IN THE CIRCUIT COURT OF CARROLL COUNTY

COMMONWEALTH OF VIRGINIA, ***Plaintiff,*** ***vs.*** ***BARRY ELTON BLACK,*** ***Defendant.***	CR98-461

* * *

Report of all the testimony, together with the motions, objections, and exceptions on the part of the respective parties, the action of the court in respect thereto and other incidents of the trial held in the case of the Commonwealth of Virginia, Plaintiff, vs. Barry Elton Black, Defendant, tried at Hillsville, Virginia, on the 23rd day of June, 1999, before the Honorable Duane E. Mink, Judge of the Circuit Court of Carroll County, Virginia.

[3] **APPEARANCES**

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[8] HILLSVILLE, VIRGINIA. JUNE 23, 1999. 9:00 A.M.

(Court Reporter is sworn to take down and transcribe the proceedings in this case faithfully and accurately to the best of her ability and to be subject to the control and discipline of the Court.)

IN THE COURT'S CHAMBERS - OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, Ms. Davis, and the Defendant, Barry Elton Black.]

MR. BAUGH: Your Honor, I have advised the Defendant of his right to be present during bench conferences and chambers conferences and under *Rogers vs. United States*, he's elected to waive his right to be present.

THE COURT: Oh, really? All right. Of course, you have every right to be present throughout, you know.

MR. BLACK: Yes, sir. I understand, but I have all confidence in my lawyer. There's no sense in me, [9] because it's, it's, but all, I'm a layman and it would be things I probably wouldn't understand anyway.

THE COURT: All right. I prefer to have you present, but if you would rather be some place else . . .

MR. BLACK: Well, if you would prefer to have me present, I'll stay, sir.

THE COURT: All right. The case on the docket for today is Commonwealth of Virginia versus Barry Elton Black. Is the Commonwealth ready for trial today?

MR. GOAD: Yes, sir. We are.

THE COURT: And is the Defendant ready?

MR. BAUGH: The defense is ready, Your Honor.

THE COURT: All right. Let's see. We can either have the arraignment back here before we go out front or we can go out front and have it done in open court. I have

elected to keep the jury on the third floor in the General District Court and just call the, call them up as we need them and we'll start with twenty (20), of course, in the beginning and then we'll send, send for the others. So with that procedure, I don't think it matters much - whether we do it back here in chambers or whether we do it in open court, eventually we'll have to tell the [10] jury in open court who the Defendant is and the charges against him and what his plea is.

MR. BAUGH: I have no objection to arraigning him in chambers.

THE COURT: All right.

MR. BAUGH: My counsel, my client has reviewed the charge, he knows the elements, he would waive formal reading and ask the Court to enter a plea of not guilty. He would demand trial by jury.

THE COURT: Very well. Then before I accept your, the waiver of the reading of the indictment, the arraignment is simply reading the indictment orally to you either here in chambers or in open court and letting you make a formal plea of guilty or not guilty. Do you join in the waiver just presented by your attorney?

MR. BLACK: Yes, sir.

THE COURT: And is it your request to be tried by a jury?

MR. BLACK: Yes, sir.

THE COURT: All right. And you fully understand the charge?

MR. BLACK: Yes, sir.

[11] THE COURT: All right. Then before we go out and select our jury, is there anything we need to take up in chambers?

MR. BAUGH: Two (2) things – one (1) is a motion in limine I've just been served. I will halfway concede with my opponent, so – "*that the Court previously ruled that Virginia Code Section §18.2-423 is constitutionally valid, therefore the undersigned asks the Court to prohibit the Defendant from arguing to the jury the constitutional issue and to refrain from arguing the Defendant was exercising his right to free speech*" – I agree that it would be improper to ask the jury to rule on the constitutionality of the statute. I do believe it is within the Defendant's right to argue that it is a free speech issue and he is exercising his right to free speech. He's saying this because he wants to say it and he believed that it was protected. I believe that is, if nothing else, mitigating and it should be argued.

THE COURT: Mr. Commonwealth, why do you think the last portion of that – the right of free speech – would be improper to argue to this jury?

MR. GOAD: It would be our position that when [12] the Court upheld the statute, he essentially said that this is, the issues in this case are not constitutional in nature, when it upheld the statute, and therefore it would be improper for them to bring the Constitution issue back into it in consideration of the Court's prior ruling.

THE COURT: Well, they're not going to, as I understand it, they're not going to mention the constitutional, the constitutionality of the statute.

MR. BAUGH: That's exactly right.

THE COURT: But why wouldn't it be mitigation if he feels he was exercising free speech and not for the purpose of intimidating, isn't that the whole thing? That it's, the statute says that if you do this, you're doing it with the inference at least that it's for the purpose of intimidating? Doesn't, does he just have to admit that he's intimidating? Doesn't he have the right to try to explain why, why he was doing it?

MR. GOAD: Yes. He does, but I don't think he has the right to say it's freedom of speech.

THE COURT: Anything else?

MR. GOAD: Judge, of course, what is an issue is whether there was an intent to intimidate. If he didn't [13] have the intent to intimidate, then he's not guilty, so I don't think that freedom of speech would apply there and so far as mitigation, that would only be in the punishment phase and he can argue that in the punishment phase.

THE COURT: Mr. Baugh?

MR. BAUGH: Your Honor, mitigation is also, there's mitigation of the elements and there's mitigation of punishment and it's my position that he, he is mitigating his guilt by arguing that he was under the impression or my arguing that he was under the impression that he was making a statement that he thought was lawful. The jury will decide whether or not it's in conformity with the law, but I would say that it is permissible and the Defendant does have the right to free speech whether this statute is constitutional or not, he still enjoys the right to free speech and I don't think the Court can take that issue from the jury.

I'm not arguing the legality of it, I'm arguing the factual validity of it.

THE COURT: Anything else?

MR. GOAD: Just that the freedom of speech is separate from intimidation of others and then again I, [14] mitigation is punishment, not guilt. He's either guilty or not guilty. There's no mitigation of it.

THE COURT: Well, I don't think the Commonwealth of Virginia or any other state can declare a crime of this nature to be a crime per se and it's a legitimate inference the jury may draw, but I think that, that the Defendant, since since he's faced with the provisions of the statute has the right to explain any other reason that he may have for burning that cross – whether it's good, bad or indifferent, I think he has the right to explain it and I'm going to permit you to let him explain it in that fashion, if that's his explanation.

MR. BAUGH: Or if I can raise it through an inference through another witness, yes.

THE COURT: That's my ruling, but you can't mention the fact, of course, the Court's ruled that it's constitutional. That's out.

All right. Anything else?

MR. BAUGH: The *voir dire* issues are going to be involved. Your Honor, I have received from my opponent, who's really, I wish he wasn't such a nice guy, he was kind enough to send me his objections to my proposed *voir* [15] *dire* issues. I will tell the Court – which puts me in a very strange position.

The Court is familiar with the *Charity* case. That's where the Judge in Virginia Beach refused to let me do *voir dire* and then the case was affirmed. Judge Annunziata said however, oh, well, so he may have violated the Canons of Judicial Conduct, it's harmless error. I had, I was up in Northern Virginia a couple of weeks ago and saw Judge Annunziata and I told her that, based upon that ruling, my only recourse now in a *voir dire* issue was to take the contempt. That's the only way I can preserve the issue. She thought it was funny.

The pressure, under the statute, Virginia has an extremely liberal statute on *voir dire*. I'm allowed to raise any issue that I believe will reflect bias or prejudice involved in the case. It's not limited to bias just against the Defendant, but bias and prejudice concerning the law. Based upon my investigation, I am of the conclusion that there are some people in the area who consider my client's behavior to be an embarrassment and to reflect poorly upon the community. My concern is that these people may seek to avoid that embarrassment by [16] disassociating themselves from the Defendant's conduct by punishing him severely or convicting him.

Therefore, I believe that is an issue that must be raised on *voir dire* to determine whether or not there is a sensitivity as to what a verdict of acquittal would do based on their sensitivities.

Additionally, counsel has objected to my commenting or talking to the jury about the range of punishment. As the Court is aware, this carries anything from a dollar ($1.00) fine up to five (5) years. Many prosecutors object to raising that issue on *voir dire,* whether or not they're willing to consider the full range of punishment if they're

already convinced that if he's guilty, I'm going to give him this sentence or give him this sentence. I'm willing to offer the Commonwealth the option of if we don't raise that issue and the Defendant is convicted, we'll just *voir dire* another jury on their bias concerning the full range of punishment and pick another one (1). But being as how we do have bifurcated trials with one (1) jury, I am entitled – going into this case – to determine if there are any preconceived notions of punishment in the event of a conviction.

[17] MR. GOAD: They can give, ask if they can consider the full range of punishment, but I think it's improper for them to know at the very beginning that it carries up to five (5) years in the penitentiary. That's not relevant until there's a guilty verdict and then at that time, under the proper instruction, they'll hear what the range of punishment is. I think it's wrong to tell them that at the very beginning of the trial.

THE COURT: Then would you, would you withdraw your objection if he simply tells this jury that they will be told that there is a range of punishment at the appropriate time if the Defendant is found guilty and then let him finish out the balance of the *voir dire*?

MR. BAUGH: I couldn't accept that option, Your Honor. To tell a jury that, ask them if they're willing to consider a full range of punishment without advising them, is I mean, it's pointless, it's a charade. The jury has to know that, if convicted, this is the range we're looking at.

THE COURT: Do you have case law to support that?

MR. BAUGH: No, Your Honor. There is very [18] little case law on *voir dire*. I am quite comfortable, well, now by Judge Annunziata, I guess, I did bring bond money just in case, Your Honor, I do not, the statute is liberal. There is no way that I, I have the representatives of the AG's office. They're real big on truth in sentencing. I don't believe that a, I would ask, I would dare the government to tell me how can, how can a jury intelligently answer a question can they consider the full range of punishment without being advised what it is? I mean, if, if they go back there and they think this is life, they're going to give a bad answer; if they think this is a dollar ($1.00) fine, they're going to give a bad answer. They don't know and there's no way for them to find out without informing them and plus I have a lot of confidence in jurors. I don't understand what the problem would be.

If the Commonwealth would be willing to tell me what the problem would be, perhaps I could come up with an option, but at this time, I, I know that I'm entitled to determine whether or not they have a bias or prejudice concerning any issue. Punishment is an issue in our state along with two (2) other states and the only way to [19] resolve it is to inform them and ask them. If you have another way to do it, I'll be glad to consider it.

THE COURT: Mr. Commonwealth?

MR. GOAD: I wouldn't have anything new. You know, the purposes of a *voir dire* is just that they will consider the full range of punishment and I think it's incorrect to tell them on the front end. That's appropriate for the punishment stage.

THE COURT: Since the Defendant is unwilling to accept the, the Court's suggestion, I think the Commonwealth's objection is well taken and the range of punishment at the *voir dire* stage is not appropriate.

MR. BAUGH: Then, Your Honor, you would place me in a conflict. Because of the ruling in *Charity* and my obligation to give my client effective assistance of counsel, I believe that if I proceed with this, he's not getting effective assistance of counsel and therefore I cannot accept the Court's ruling and, being as how Judge Annunziata has said that's harmless error, I must advise my client that he should terminate my services because I am about to enter into an effort where I know that I am giving ineffective assistance of counsel which I am [20] prohibited from doing by oath.

If I was guaranteed . . .

THE COURT: Let me ask you something.

MR. BAUGH: Yes, sir.

THE COURT: You're saying Judge Annuziata has said that this is harmless error. This is harmless error?

MR. BAUGH: Judge Annunziata in *Charity* has said that issues on *voir dire* like this are harmless error.

THE COURT: Oh. Oh. Not this particular question?

MR. BAUGH: No. Not the particular question. No. But I can tell you that that question was a question that I wrote out and the Judge gave in that case. We've

had this objection before and we've always prevailed. There is no case law and we've always prevailed on it. But, Your Honor, I, that's a charade on the jury and I, and it's also, I think it's going to have tremendous negative effect on my client. I have no case law to support it.

There is no case law. There's less than a page of case law under that statute in the annotations, but I would ask the Court if, unless someone can tell me how [21] that jury can intelligently decide what they will consider the range, I'm not going to be a party, I can't do that. I have to tell my client, I'd like a moment to go outside, I think he should terminate my services because I can't do that.

If I knew it was going to be preserved for appeal, yes, but in light of that ruling, the only thing I can do is either take the contempt – and I don't know if you built a new jail, you've got a nice new building, but I don't know if you've got a new jail – . . .

THE COURT: Well, we do, just, just so you'll know.

MR. BAUGH: Oh, thank you. I feel so much better. Then I'll take the contempt.

THE COURT: All right.

MR. BAUGH: I'll take the contempt. You can punish me appropriately, but I can't abide by that ruling. I'm sorry, sir.

THE COURT: Well, do you want to talk to your client? That will not cause the Court to change its ruling.

MR. BAUGH: I understand. Then, Your Honor, I'd [22] like to take an interlocutory on this one (1). It's so

dispositive of the issue. I want to get an interlocutory. I want to go up on this one (1). I don't want, I think . . .

THE COURT: What authority do you have to go up on an interlocutory?

MR. BAUGH: Well, if we agree we can do it, we can do it. I don't think I can violate my oath. And if I get out there and do it, you're going to cite me for contempt and I can tell you I'm going to do it.

THE COURT: Well, we'll see.

MR. BAUGH: Your Honor, I will.

THE COURT: Well, that's fine. You know, you have to do what you have to do, I assume, and I'll do what I have to do to . . .

MR. BAUGH: That's fine, but, Your Honor, you understand that if I do . . .

THE COURT: To preside over this case.

MR. BAUGH: If I know I'm going to jail, even though I don't mind going to jail, it is going to cause reservation and he's not going to get the full degree of advocacy he deserves. I would seriously suggest that the [23] government consider withdrawing this one (1) because we are going to consider it. The jury is going to know, if the jury is going to consider the full range, they're going to know up front.

THE COURT: We will recess – I need the approval of the Defendant to, to go off the record, but we'll recess the hearing and let each of you go to a place where you can discuss your position with your client, Mr. Baugh . . .

MR. BAUGH: Yes, sir.

THE COURT: And the Commonwealth can consider its position.

MR. GOAD: Yes, sir.

THE COURT: And I will give you approximately ten (10) minutes to do this and then come back.

MR. BAUGH: Thank you, sir.

THE COURT STANDS IN RECESS

THE COURT: All right. The Commonwealth have anything he would like to talk to defense counsel about? Do you have any resolution that you want to propose?

MR. GOAD: Yes, sir. I do.

THE COURT: Do you want to do it on the record or do you want to do it in privacy between you and counsel or how do you want to do it?

MR. GOAD: I'll just do it on the record.

THE COURT: All right. Very well.

MR. GOAD: Judge, while in recess, I've reconsidered my objection to the *voir dire* issue about the punishment and I'm willing to amend my objection to where it's okay for the jury in the *voir dire* to be advised of the range of punishment, but I want the Court to advise the jury of the range of the punishment as opposed to counsel.

MR. BAUGH: No objection as long as we do it.

THE COURT: All right. I guess we have an instruction in here that tells us it's, let me . . .

MR. BAUGH: All that great error gone to waste.

THE COURT: All right. And that range is, let's see, one (1) to five (5) years in the Department of Corrections or confinement in jail for a specific time but not more than twelve (12) months. I tell you what I'll do, I'll just . . .

[25] MR. GOAD: I've got extra copies if you want to pull that out.

THE COURT: I'll just put a clip on it and I can go to it rather than try to, all right. That apparently is resolved, so we'll go to . . .

MR. HURD: Judge, if I may add one (1) comment about it, as a result of our discussions, it will be helpful perhaps if the, if the lower end of the range was made doubly clear to the jury. A layman coming in hears "in jail up to twelve (12) months" he's going to focus on the twelve (12) months and not, not realize perhaps that it could be one (1) day to twelve (12) months.

MR. BAUGH: I don't mind telling the jury that. That's what I always do. I tell them it's from as little as one (1) day or one dollar ($1.00) fine up to five (5) years. I've done this before. If you want me to do it, I'll be glad to.

THE COURT: I'm basically going to paraphrase the instruction that I will give if we get to the penalty stage and you're entitled to elaborate on it, if you wish.

MR. BAUGH: Thank you, sir.

THE COURT: All right. Next? Now, let me say [26] something so we can move this along. Anything that's

in these proposed questions by Mr. Baugh that goes to bias or prejudice, I'm going to approve. I think that that's the whole purpose of the *voir dire* and I'm going to permit it. So with that in mind, let's go forward with the, with the balance of these objections.

Let's see. On Page 1 of Mr. Baugh's letter, there's a partial objection?

MR. BAUGH: Oh, yes. Let's see. The question, the topic is whether the panel member had, *"based upon the facts obtained either from the media or elsewhere, expressed any opinion as to the guilt or innocence of the Defendant or the outcome which should be had, either due to the Defendant's actions or due to his membership in the Ku Klux Klan"*.

Your Honor, I would submit that the second part that the Commonwealth has objected to *"or [to] the outcome which should be had, either due to the Defendant's actions or due to his membership in the Ku Klux Klan"*, I believe that it is obvious that my client is a member of the Ku Klux Klan. I believe there are biases and prejudices held by many people both for and against that organization and [27] his association with that organization and for that reason and the fact that the Klan name is going to be in there, I believe that that is a proper area in which bias or prejudice could occur and for that reason, it is subject to *voir dire*.

THE COURT: Mr. Commonwealth?

MR. GOAD: Judge, I think the first part of it sufficiently addresses the issue of bias or prejudice of the Defendant and I think the last half of it, as I indicated, would, you know, go too far in that area.

MR. BAUGH: Oh, I understand. Forgive me. May I speak, Your Honor? My concern is this, is that when talking with people about this case, some people are of the impression that because of the nature of the offense or because of the nature of the organization, that anyone who belongs to that organization be convicted or anyone who belongs to that organization should be more severely punished than someone who doesn't. The only way to cut off that prejudice is to ask them whether or not they've discussed what should happen if a member of the Klan is convicted of a crime.

THE COURT: All right. I'm going to overrule [28] the objection. I think that we want a jury that will not convict this individual by association and I think he's entitled to, to go into that. I'm going to, he should be tried on what he did and not the organization he belongs to.

What's next?

MR. BAUGH: The next question objected to is whether the panel member *"has heard, either directed to [the] panel member or overheard by [the] panel member, any suggested dispositions for the offense alleged against the Defendant"*. In the *Mu'min* case, M-U-apostrophe-M-I-N, the Supreme Court has said we cannot discuss the information that has been communicated, but there has been no bar against the result or suggested, we are not allowed to say what did you read or what did you hear, but – and I'm not going to ask that – but if someone has said that I believe someone, actually it is, it sort of goes into the question above it, and in a sense of fair play, I'll withdraw it.

THE COURT: O. K. O. K. So the whole, we don't have to address the three (3) items at the top of Page 2?

MR. BAUGH: Yes. I think, unfortunately, well, I can tell you that, I don't want to lowball you, Judge. [29] I'm, those areas will be incorporated in this, the one (1) you've said is not a, where I've already, you've already ruled on it. I mean, what outcome should be had either due to the Defendant's actions or due to his membership and those issues are going to be incorporated in that. That's going to happen.

THE COURT: I don't understand your point.

MR. BAUGH: What I'm saying is that, what I'm saying, Your Honor, is that the second issue, the second question and the third one (1) with its subparts are really one (1) question and so I was going to surrender the third question, but I can tell you that when doing the first one (1), those issues are going to come up – what was the suggested disposition, did they have, did they ever make a comment about what should happen in this case, things like that. If I get answers saying that they've obtained, they have an opinion as to the guilt or innocence and they have an opinion as to what the punishment should be, I think I have to ask them what it was. I mean, they're going to want to know, too.

THE COURT: Let me tell you, let me tell you what we're going to do. If that occurs, if we get to that [30] point . . .

MR. BAUGH: Where someone says . . .

THE COURT: That, yes, they've talked about it . . .

MR. BAUGH: All right.

THE COURT: Then we're going to stop the inquiry with that particular juror at that point, we'll, and at some point, we'll call that juror in by, by the juror, by himself or whatever . . .

MR. BAUGH: For individual . . .

THE COURT: Individually.

MR. BAUGH: O. K. That's fine.

THE COURT: And then we can go into what they've heard and whether or not they've formed an opinion, basically, and, and decide whether or not that juror is qualified.

MR. BAUGH: All right. That's fine.

THE COURT: And that's what I want on the, when we have the twenty (20) people out there, if there's an answer that, that indicates that we need to go further into an inquiry with that particular juror, I don't want to contaminate another group.

[31] MR. BAUGH: That's fine.

THE COURT: I'll call them back. But, and obviously we'll, we'll pretty well know which ones you'll want to call back and I'll give you that opportunity at some point if it looks like we need to bring, to bring a juror in just to make further inquiry.

MR. BAUGH: I think that's a much better procedure. I agree.

THE COURT: All right.

MR. BAUGH: The other ones, the remainder of them, some of them are not couched in terms of a question

because I, as I told you, these are areas about which I will discuss. I can tell you, for example, in the first one (1), I will ask the jury that, if any of them have disagreement with the presumption of innocence which means that when we begin a trial in the United States, a Defendant is presumed not to have done the offense and until such time as the government convinces them of it, does anybody disagree with that law, anybody see the Defendant as anything less than innocent. That's the . . .

THE COURT: I understand that.

MR. BAUGH: Yes, sir.

[32] THE COURT: All right. It looks like Page 2 with the, we've worked out the balance of Page 2.

MR. BAUGH: I should have numbered these. I'm sorry.

THE COURT: Now, Page 3.

MR. BAUGH: I believe you're ruled on that one (1). Didn't you say as long as it's couched in terms of bias or prejudice, all of these are bias and prejudice questions, the ones to which the government has objected.

MR. GOAD: Well, the first one (1) goes further, the first one (1) that I objected to . . .

THE COURT: Uh-huh.

MR. GOAD: On Page 3, goes further than the bias or prejudice. Then it goes forward to ask do they think a member of the Klan "*has a predisposition to commit certain types of crime[s]*". I think that goes beyond the general bias or prejudice.

MR. BAUGH: It has been my experience, Your Honor, if I might, that there are certain groups of people – and I've never had this one (1), but similar ones, but this is my first Klan case – but I have had situations where, say, drug defendants are Jamaican nationals or from [33] New York or I'm in a sodomy case and my client is an admitted homosexual. There are people who believe that certain people – because of who they are or because of they're from, the place from which they come – are more likely to commit a crime than someone else. It's the, it's flat-out prejudice and I believe that, it's my belief that there is, that the Ku Klux Klan is associated with certain types of behavior and I will, and the jury has to understand that, as you pointed out a moment ago, he's not to be tried for his association. He's to be tried as an individual for his actions on that date.

THE COURT: I agree. I think that he's, we need to know whether or not the, the mention of the Klan effects the disposition of this case and if one (1) has preconceived notions, then they shouldn't be serving – one (1) way or the other.

MR. BAUGH: Yes, sir. One (1) way or the other.

THE COURT: They may have sympathies the other way and think that the Klan . . .

MR. BAUGH: As is their right.

THE COURT: All right. Next. All of these, and I think they are, I'm going to let that be investigated by [34] the Defendant.

MR. GOAD: The one (1) that says *"send a message"* in it?

THE COURT: Now, that one (1). Let me look at this one (1).

MR. BAUGH: Let me see. Which one (1) is that? Oh, yes.

MR. GOAD: Second from the bottom.

MR. BAUGH: What is the *"send a message"*? *Buck vs. Commonwealth*, isn't it? The *"send a message"* is, the *"send a message"* argument on behalf of the Commonwealth is improper, according to *Buck vs. Commonwealth*. It's a Richmond case. About, what, seven (7) years? I believe you were in the office then when that was argued, about Steve Buck was the lawyer, in fact, and being as how the government is not allowed to argue the *"send a message"* argument, I can only assume that the inverse, that it is improper for the jury to *"send a message"* and that their guilt or deliberations are to be based upon his actions solely.

So relying on an inference from *Buck*, I would argue this is a proper question.

[35] MR. McLEES: I think that sentencing is always, that the deterrence of crime specifically and in general in the community is always an appropriate consideration in sentencing.

MR. BAUGH: I'll rely on *Buck*.

MR. McLEES: They can't find him guilty in order to send a message, but they certainly can sentence him in order to send a message.

MR. BAUGH: If the Court would like to view the case, *Buck* was a sentencing issue. It was before we had bifurcated trials, but I believe . . .

MR. McLEES: Well, that's the, that's the . . .

MR. BAUGH: He said we need to send a message with our, with the punishment.

MR. McLEES: The Commonwealth can't argue that in general in trying to convince the jury to find a man guilty because, of course, by finding an innocent man guilty, you don't send the right message anyhow. Once the man is found guilty and they're determining penalty, sending, the consideration of sending a message to others who might be tempted to commit the same crime is a, is imminently a proper part of sentencing.

[36] MR. BAUGH: If I may, Your Honor, I would point out that if my client as an individual is, should be punished with a one (1) year sentence, to give him a more severe punishment to send a message to other people for conduct he did not commit is equally violative of his rights. He is to be . . .

THE COURT: Aren't we already asking this jury if they're willing to consider the entire range of punishment?

MR. BAUGH: Well, I am concerned, Your Honor, and I don't think it's served by that because I, it is important that a jury knows that they are to convict him based on his conduct or acquit him based on his conduct and if he is to be sentenced, he is to be sentenced upon his conduct and his conduct alone, not to, to influence other people. He's not a scapegoat. He's not an effigy to be punished as an example. He's to be punished based upon his conduct.

MR. McLEES: Your Honor, they certainly can consider the necessity of impressing on other like-minded people that they shouldn't commit the same kind of deed and take that into consideration in fixing the punishment.

[37] THE COURT: I believe the Commonwealth's motion is well taken on this question. I'm going to sustain the objection.

MR. BAUGH: To which, of course, I will object.

THE COURT: Yes.

MR. GOAD: And then the next one (1) that starts at the bottom and goes to the top is clearly outside bias or prejudice if it's put the county in a negative light or positive image of the community.

MR. BAUGH: I thought that was a brilliantly drafted question.

THE COURT: Any further comments?

MR. BAUGH: The question for my client is, "if [any] members of the panel have a bias or prejudice that the alleged activities of the Defendant or the Ku Klux Klan are such that the image of the city or county [has] been cast in a negative light [and], if so, would a conviction or imprisonment of the Defendant be a likely method [for] maintaining a positive image of the community".

Your Honor, I think that we would be remiss if we did not say that because of the, I mean, this is the [38] first case I've had that's been reported in the BBC. There is and there will be a tremendous amount of pressure on these jurors because of the nature of the offense and the publicity.

There is, in all likelihood, the verdict that comes out of this jury today – and everyone knows it – will be on the front, it will be in international news and some on the front page. I mean, MS-NBC has already called and asked us to be on the news tonight regardless of the verdict. By the way, we said no.

To assume that the negative light issue is not an issue is disingenuous.

MR. GOAD: Of course, that comes after the verdict is over. You know, we're talking about bringing it at the, when we voir dire the jury. What he's saying about the international news and all that, yeah, that was previously, but since the Court's ruling on the constitutional issue, there's been very little publicity about this case. Neither of the local newspapers – the *Carroll News* or the *Gazette* – has any article about today's trial taking place, I don't believe. There's been very little publicity since the Court's ruling on the constitutional question. You know, so today we don't have [39] it too much, but afterwards certainly we will.

MR. BAUGH: I should tell the Court that I did tell MS-NBC that if Soledad O'Brian was going to do the interview, I might appear.

THE COURT: Uh-huh.

MR. BAUGH: But based on the Court's ruling on that one (1), you're going to have to, it's going to be a similar ruling to the next one (1).

THE COURT: I'm reviewing those now to see if . . .

MR. BAUGH: It is a package. In the interest of time, Your Honor, if you will, if the Commonwealth will permit me to have the question which is the first complete question on Page 4 – *"if members . . . have a bias or prejudice which compels their feeling personally embarrassed that this activity occurred in their neighborhood or jurisdiction"* – I think I can knock out the one (1) before and the one (1) afterwards in the interest of time.

THE COURT: Whether they agree to it or not, I will rule that that's fine.

MR. BAUGH: Thank you.

[40] THE COURT: We will go with, let you ask one (1). Now, that will, so I've sustained the before and after.

MR. GOAD: The one (1) that starts on Page 3 and goes to Page 4 you've sustained?

MR. BAUGH: Yes.

THE COURT: Yes.

MR. GOAD: And the second one (1) on Page 4 you've allowed?

THE COURT: Yes. You know, you can save your objection if you wish. All right. With, now, we're down to *"Will a verdict of not guilty reflect disfavorably on Carroll County?"*

MR. BAUGH: My concern there is that, as the Court is well aware, there are members of the community who are not going to serve on the jury and one (1) of the issues we do need to bring up is whether the jury has

contemplated whether or not when they go back in the jury room, they're going to make a, come up with a verdict that's going to make their neighbors happy and that happens in all cases. Only by, and I would couch it in terms of bias or prejudice, but I think it's important to [41] my client's rights that if we, we determine whether there is an influence in the panel to determine a verdict which will allow them to go home and speak to their neighbors or get a decent meal from their wife or husband.

THE COURT: Mr. Commonwealth?

MR. GOAD: I think that's beyond the proper voir dire. I think that's inviting them to argue.

THE COURT: I agree with the Commonwealth. We want to know their own biases and prejudices and whether they can sit on this jury and give, give the Defendant a fair trial. I feel like that the objection is well taken.

MR. BAUGH: Well, then, Your Honor, we would object to the Court's ruling because none of the questions that are proposed deal with the ever present influence of local public opinion which is always an issue in a case like this, local public opinion and the fear of being ridiculed like the O. J. Simpson jurors is a factor. When you talk to jurors, they do worry about that and this is the only question that addresses that issue.

And so I will couch my objection in terms of my client does have a right to, under Article I, Section 8 of the Virginia Constitution, to a fair and impartial jury [42] that is free from unreasonable influences and prejudices. I believe that until such time the record reflects that there is, there is no likelihood of jurors feeling pressured by their neighbors to come up with a given verdict, the only

way to raise that is with this question, until such time as the record is clear of that issue, my client is being denied of his right under Article I, Section 8 or he's being denied, denied the right to his right to counsel under Article I, Section 8 and the Sixth Amendment, his effective use of counsel because without that information, I'll be, I'm making strikes in the dark. So we preserve our constitutional issues.

THE COURT: All right.

MR. GOAD: The one (1) just up above that is similar. I don't believe we addressed that one (1) yet. Where at the end, it says a verdict of not guilty would reflect that "*activities of the . . . Klan are endorsed by the citizens of Carroll County*".

THE COURT: But he . . .

MR. BAUGH: That's already been struck.

THE COURT: He agreed to struck that if I would let him go with the question above.

[43] MR. GOAD: O. K. All right.

MR. BAUGH: But if the Commonwealth is offering us a substitute, that I should take that one (1) and lose the one (1) before it, in a sense of cooperation, I'm willing to do that.

MR. GOAD: No. I like the one (1) up above it.

MR. BAUGH: Because I believe it does, I believe it is a valid issue that Ku Klux Klan activities are endorsed and I would willingly give up the next one (1) because it covers the same topic.

THE COURT: All right. What about the, the remaining? The next objection – *"Are there any jurors who would change their vote concerning guilt or punishment, if guilt is the verdict, because they were in the majority and not because they agreed with the fellow jurors?"*

MR. BAUGH: That should be minority. I was tired. Whether or not they would change their verdict because they were in the minority.

The Defendant is entitled to twelve (12) jurors, not eleven (11) speaking for twelve (12). The only way to address that issue is to bring it up on *voir dire* – that it is not majority rule. It must be unanimous in every [44] one's verdict, everyone's conscious must be voted.

THE COURT: The basis of the Commonwealth's objection is what?

MR. GOAD: It's inviting the jury to argue and disagree.

MR. BAUGH: We'll stipulate that's a good thing.

THE COURT: I agree. I agree with the Commonwealth. I believe the jury will follow the Court's instructions and I think that that's argumentative and it doesn't help you determine whether or not there's any bias or prejudice.

MR. BAUGH: We would re-urge the same objections, the Constitutional objection, as the one (1) previous.

THE COURT: All right, sir.

MR. BAUGH: The government had objected to the last two (2).

THE COURT: I guess it's the same, the same basis, isn't it, as the one (1) I just ruled on?

MR. BAUGH: Yes. I would agree, Your Honor.

THE COURT: O. K. I'm going to sustain that objection and each of you, I guess, disagree for reasons [45] previously stated. Is that a fair statement?

MR. BAUGH: On behalf of the Defendant Black, that's correct, Your Honor.

MR. GOAD: Yes, sir.

THE COURT: And I feel the same way about the last question. I'm going to sustain the objection.

MR. BAUGH: I thought you had. Yes. We would have the same objection, Your Honor.

THE COURT: All right. I believe that does it, doesn't it, folks?

MR. BAUGH: That's it.

THE COURT: If we're ready to go, anybody need a break before we go and impanel the jury?

MR. BAUGH: If I could, and I know the government doesn't have to, but can the government give me an estimate of how many witnesses they have just so I can figure out whether or not we need hotel rooms for the night?

MR. GOAD: Sure. I'll be glad to and then you tell us, too.

MR. BAUGH: Sure.

MR. GOAD: Three (3).

[46] MR. BAUGH: Zero.

MR. GOAD: O. K. We'll be here one (1) day. I do have a couple of short matters for the record.

THE COURT: All right.

MR. GOAD: Judge, previously, I filed the notice of prior criminal convictions pursuant to § 19.2-295.1. I did file those in a timely matter, in a timely manner and according to the Code section, before the beginning of trial, I'm to provide defense counsel with a copy of those and I have complied with that provision.

MR. BAUGH: That's correct, Your Honor. It has been tendered. I will tell the Court that I have not had a chance to go over it with my client as yet and also there's a question because one (1) of them appears, there appears to be a vacation order somewhere of one (1) of these, I don't know which one (1). None of these, some of these don't even show up on the NCIC computer check and I don't even know how you found all of them.

We would object, all of them are extremely stale. I don't believe there are any past 1972?

MR. GOAD: There's a '74 and I think one (1) was '79. I'd have to go back and look, but it's all '70's at [47] the earliest.

MR. BAUGH: My only other concern would be the information tendered, there's one (1) sheet that shows a conviction, of course, they're entitled to that. The other sheet shows the punishment given for those offense and we would submit that's improper, that the jury did not, I mean, while I am entitled to notice, I do not believe that goes to the jury. The jury is told the number of offense and

I believe you're entitled to tell them the offenses for which the Defendant has been convicted, but as to what punishment might have been meted out, I would submit that it would be improper.

MR. GOAD: Well, we can go over that later.

THE COURT: All right. As long as we're, there is compliance and I agree that there may be some discussion later with regard to the total admissibility, but we'll go over that later, defer that until a later time.

MR. BAUGH: Yes, sir.

MR. GOAD: And, of course, previously the Court met Mr. John McLees and Bill Hurd from the Attorney General's office and previously there's been no objection [48] to them being here and working on the case and I'm assuming that still stands today?

MR. BAUGH: That's correct. It does.

THE COURT: All right. Are all three (3) of you going to sit at counsel tables?

MR. BAUGH: Or close by.

MR. GOAD: Or close by.

THE COURT: Well, do I need to, who do I introduce? That's all I need to know.

MR. BAUGH: All of them?

THE COURT: Just yourself or all of them?

MR. GOAD: Yes, sir. Unless you all want to be. Just me then, I guess.

THE COURT: Just you. All right. They're going to sit in the background. If they're going to sit at the table, I'm going to introduce them. If they're going to sit close, then . . .

MR. GOAD: O. K. Mr. McLees will be at the table next to me.

MR. McLEES: I guess he should introduce me then.

THE COURT: I think I should.

[49] MR. McLEES: Yes, sir.

MR. BAUGH: And I'd ask you to introduce . . .

THE COURT: Sara Davis, is it?

MS. DAVIS: Yes, sir.

MR. BAUGH: Sara G. Davis. Her mother wants that *G* thrown in there.

MS. DAVIS: You can leave the *G* out.

THE COURT: All right. Unless you need a little recess, we'll go get started.

MR. BAUGH: Two (2) or three (3) minutes please, sir.

THE COURT: All right.

MR. BAUGH: Oh, and the Defendant is waiving his right to be present at any bench conferences.

THE COURT: All right.

MR. BAUGH: Thank you, sir.

THE COURT: Thank you.

* * *

IN THE COURTROOM – IN OPEN COURT

[50] BAILIFF: Circuit Court for Carroll County is now in session, the Honorable Judge Duane E. Mink presiding. Silence is commanded while Court is in session. Be seated and come to order.

THE COURT: All right. Mr. Goad and Mr. Baugh, would you come forward and let me ask you a question?

* * *

CONFERENCE AT THE COURT'S BENCH

THE COURT: Sometimes we just call the jury taking the first twenty (20) names on the list and that might be the easiest way to do it today. Do you have any objection to that or do you want us to put the names in and do it by lot?

MR. GOAD: Whichever.

MR. BAUGH: I have no objection.

THE COURT: Then we're just going to take the first twenty (20).

MR. BAUGH: I have a question. Do we question from the table or do you want us to stand?

[51] THE COURT: Whatever you're comfortable with. I want you to be, I want everybody to be comfortable in my court.

MR. BAUGH: Thank you. All right.

THE COURT: If you feel comfortable sitting, fine; if you want to go back and forth, you can do that.

MR. BAUGH: Thank you, sir.

THE COURT: All right, sir.

* * *

THE COURT: All right. The case on the docket for today is Commonwealth of Virginia versus Barry Elton Black. Both parties have announced ready and we're now calling the jury that's awaiting on the first floor. Bring in the first twenty (20) and if they will stop in the back and we'll call their names as they come forward.

MR. GOAD: As far as the seating of the jury, will they start on the back row?

THE COURT: Start here and we'll take, we have seven (7) chairs here now, don't we?

THE CLERK: Yes, sir.

[52] THE COURT: The first seven (7), the second seven (7) and then we'll go up this wall over here.

* * *

[At this time, an initial panel of twenty (20) jurors was called to the courtroom and examined on *voir dire* by the Court, Mr. Goad and Mr. Baugh. There was individual *voir dire* of jury panel members as requested. Of that initial panel of twenty (20) jurors, three (3) jurors were challenged for cause by the Defendant and were excused by the Court. Subsequently, seventeen (17) members of the first panel were seated as the venire.

A second panel of five (5) jurors was called to the courtroom and examined on *voir dire* by the Court, Mr. Goad and Mr. Baugh. The first three (3) names that were called of the second panel were free from challenge and were seated to complete the venire of twenty (20) members, free from objection.

The Court stood in recess at that time in order for both parties to review the panel members.

While the list was passed between the parties, [53] the Court read the following preliminary and cautionary instructions to the jury.]

* * *

THE COURT: Members of the jury, at this point, the attorneys are going through the process of striking the jurors. All twenty (20) of you have been found free from objection and qualified to sit on the trial of this case. However, under the laws of the Commonwealth of Virginia, each of these parties will have to strike four (4) names apiece. So twelve (12) of you will end up trying the case. We don't know which twelve (12) that will be, so at this point I'm going to read you the preliminary cautionary instructions which will advise you how the case will proceed and since we don't know which twelve (12) will try it, I request that all of you attend to the reading of these instructions.

The case will proceed in the following order. First, the Commonwealth Attorney may make an opening statement outlining his case. The Defendant may also make an opening statement outlining his case immediately after [54] the Commonwealth Attorney's statement. Neither the

Commonwealth Attorney nor the Defendant is required to make an opening statement.

Second, the Commonwealth Attorney will first introduce evidence. At the conclusion of the Commonwealth Attorney's evidence, the Defendant has the right to introduce evidence. Thereafter rebuttal evidence may be introduced.

Third, at the conclusion of all the evidence, further instructions will be given you, after which the attorneys may make their closing arguments. Then you will retire to select a foreman, deliberate and arrive at your verdict as to the guilt or innocence of the accused.

Faithful performance by you of your duties is vital to the administration of justice. You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against any party to this suit for each party is entitled to the same fair and impartial consideration.

The law applicable to this suit is given to you in these instructions and in those other instructions that you will receive at the close of all of the evidence and [55] it is your duty to follow all such instructions. It is your duty to determine the facts and to determine them from the evidence and the reasonable inferences arising from such evidence and in so doing, you must not indulge in guesswork or speculation.

The evidence which you are to consider consists of the testimony of witnesses and the exhibits admitted in evidence. The admission of evidence in court is governed by rules of law. From time to time, it may be the duty of the attorneys to make objections and my duty as Judge to rule on those objections and whether you can consider

certain evidence. You must not concern yourself with the objections or the Court's reasons for these rulings. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken.

Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

No statement or ruling or remark which I may make during the course of the trial is intended to indicate my opinion as to what the facts are. You are to [56] determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the suit, the relation of the witness to any parties to the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness' statements and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may determine the testimony of such witness is entitled to receive.

Until this case is submitted to you for your deliberation, you must not discuss this case with anyone nor remain within hearing of anyone who is discussing it. To avoid the possible appearance of impropriety, I strongly urge and suggest to you that until the trial is concluded, you shall not converse at all with anyone connected with the trial as a party, witness, or attorney.

After this case has been submitted to you, you must discuss this case only in the jury room when all [57] members of the jury are present. You are to keep an open mind and you shall not decide any issue in this case until the case is submitted to you for your deliberations under the further instructions of the Court.

Now, that concludes the reading of the cautionary and preliminary instructions. We'll await the striking of the jury.

* * *

[In open court in the presence of the jury panel, both sides struck four (4) members each and a panel of twelve (12) jurors was chosen to hear the case. Those jurors were as follows: Sharon Beasley; Angela Bowman; Sherry Dawn Burnette; Doris Gardner; Donna F. Maldonado; Gary Lyons; Rayborn E. Lyon; James Lowe; Vander Kirkland; Dannie Wayne Martin; Rena H. McAlexander; and Cheryle D. McCraw. They were charged by the Clerk as follows: You shall well and truly try the issues joined between the Commonwealth of Virginia, Plaintiff, and Barry Elton Black, Defendant, and a true verdict give according to the evidence, so help you God? To which the entire [58] panel indicated an affirmative response.]

* * *

THE COURT: Members of the jury, at this point, it is approximately a quarter of twelve (12:00) and we've decided, rather than begin the actual trial of the case which is the opening statements of the attorneys and then the evidence that may be presented with regard to these charges, that we would break for lunch. I'll ask you to

return at a quarter of one (1:00) and we'll try to get started on time.

While you're out, don't discuss the case with anyone. Do not remain within hearing of anyone discussing the case. When you return to the, to the courthouse, if you would come to the, I guess they better come to this room first, come to the courtroom and then we will, the Bailiff will be here to take you back to the jury room and we'll ask you to stay there until the case is ready to be called.

Yes, sir?

MR. BAUGH: Your Honor, would you please inform [59] the jurors that if we see them in the street, Mr. Goad and his attorneys or mine, if we don't speak to them, we're not being rude, but we're not allowed to.

THE COURT: That's exactly right and I couldn't say it any better. We have to, we have to avoid the appearance of impropriety and you might be talking about the weather, but others may not believe that. So if you see us on the street, we're not stuck up and we're glad you're here today. We'll now excuse you until . . .

THE CLERK: Excuse me, Your Honor, but they'll need to wear their badges.

THE COURT: Right. And we'll see you at a quarter of one (1:00).

THE COURT STANDS IN RECESS FOR LUNCH

THE COURT: All right. Both parties ready to begin?

MR. BAUGH: The defense is ready, Your Honor.

THE COURT: Thank you. Commonwealth ready?

MR. GOAD: Yes. I'd make a motion to sequester the witness.

[60] THE COURT: Bring in the jury.

MR. GOAD: I would have a motion to sequester the witness.

THE COURT: All right. I'm a little bit surprised because they're your witnesses, but you're entitled to . . .

MR. BAUGH: I was going to make the motion anyway.

THE COURT: O. K. Anyone going to testify, come forward please. Anyone that's called as a witness in the case, come forward.

MR. GOAD: No witnesses for the defense?

MR. BAUGH: No.

THE COURT: We will, we'll do the oaths individually when the jury's present. While you're out, don't discuss your testimony with anyone and we'll call you as we need you. If you'll wait in the back, they'll show you one (1) of the witness rooms where you can wait until you're called.

(All witnesses in the case are excluded from the courtroom and from the hearing of any of the matters [61] therein.)

THE JURY RETURNS TO THE COURTROOM

THE COURT: We've got an extra seat. That's why it looks like we're missing somebody. All twelve (12) members have returned. You may begin with your opening statement.

MR. GOAD: Thank you, Judge.

* * *

OPENING STATEMENT BY MR. GOAD:

Good afternoon, ladies and gentlemen. As you know from this morning, my name is Greg Goad. I'm the Commonwealth's Attorney for Carroll County and I'm here today to prosecute the case of the Commonwealth versus Barry Black. John McLees is here also with me to work on the case.

The evidence as was mentioned to you earlier today is going to be short, so with the short evidence and [62] the short case that calls for a short opening statement by myself. Now, after I speak, Mr. Baugh will give his opening remarks and then we'll proceed on with the testimony.

I'll have three (3) or four (4) witnesses to present to you in this case. The first witness will be Sheriff Warren Manning. He'll testify that on the date of August 22nd, that he was employed as the Sheriff of Carroll County and that evening when he returned to his home in Woodlawn, he received notification that there was a Ku Klux Klan gathering in the Cana section of our county. He then notified First Sergeant Rick Clark and other deputies and then went down to Cana to see where the gathering was taking place at.

Upon his arrival, he saw on the road or next to the road, excuse me, a four (4) by eight (8) foot sheet of plyboard that said *KKK Meeting* and then you could also see individuals in a field. Now, as I mentioned, this is in the Cana section in the county where the terrain is more flat than it is up here in this section of the county. He remained at the scene along with Investigator Clark and also other deputies, talked to some of the individuals [63] that were having the gathering and then proceeded to stay and observe what was happening.

Now, Roger and Rebecca Sechrist, they lived next to the tract of land where the rally was taking place at. Now, Sheriff Manning will testify that as he stayed there at the scene, along with Investigator Clark, that eventually, as the time went on, that there had been a cross erected on this property and the testimony will be that this cross was approximately twenty-five (25) to thirty (30) feet tall, clearly visible from the public road and also within the area of approximately ten (10) homes.

As they were there making sure that nothing occurred, then as the Klan gathering continued, at this point, they're in white robes and hats, then as part of their ceremony then the cross was burned and it glowed out over the whole area where these homes were at and both Sergeant Clark and Sheriff Manning saw the burning of the cross. Upon doing that, they checked with the dispatcher on exactly what the cross burning statute is in Virginia.

After that, they proceeded onto the property and asked who was responsible for the gathering. The [64] Defendant, Barry Black, came forward and said that he was leader of the gathering and that he was responsible

for the burning of the cross. He was then placed under arrest for violating the statute here in Virginia and Investigator Clark then placed him in his vehicle for a trip to Hillsville to see the magistrate.

Once they were in the vehicle and proceeding to the county jail, Mr. Black began a conversation with Investigator Clark and one (1) of the comments that was stated "when is the white man going to stand up to the blacks and the Mexicans in this neighborhood" and he further went on to say that he had heard that the blacks and whites were holding hands and walking down the sidewalk in that area.

Well, Investigator Clark told him that there were not any sidewalks in Cana, Virginia and Mr. Black said that he had been mislead. And they brought him on up to the jail and he was processed and then he later, we proceeded on with the case we're here today on.

Now, Rebecca Sechrist and possibly Roger Sechrist will testify that they are neighbors that own the property adjacent to the rally, as I mentioned to you [65] before, and she will tell you and possibly Roger about how the effect of this Klan rally and the burning of the cross had on them.

At the conclusion of the case, I'm confident that you'll see that we have proved beyond a reasonable doubt that Mr. Black burned the cross with the intent to intimidate. Thank you.

* * *

THE COURT: Mr. Baugh?

MR. BAUGH: Thank you, Your Honor.

* * *

OPENING STATEMENT BY MR. BAUGH:

May it please the Court, counsel. It's not illegal to burn a cross in Virginia. It's illegal to burn a cross with the intent to intimidate others, to place them in fear of immediate or imminent serious bodily injury or death. There is the difference. I want to [66] point out first, however, that every person, if any citizen doesn't like something in our nation, if you don't like blacks and whites holding hands, if you despise Rush Limbaugh, that's my personal favorite, you have a right to say it. You have a right to express it. You can't say it in a way that makes other people think they're going to be hurt, but you have the right to say it.

The fact that the government comes in here and says that this man told a deputy that he doesn't think blacks and whites should hold hands, that's his right. If he doesn't want to hold my hand, I don't care. that's [sic] his right because he's a citizen.

One (1), they also didn't tell you that in addition to Mr. Black being down here, there was a sign up telling people that there was a Klan rally and that it was private and that outsiders would not be tolerated. You couldn't come in. It wasn't open to just anybody, so it was a warning sign.

Additionally, I want to agree with something counsel has said – the cross was burned and I believe he said as part of their ceremony and that was why it was burned – not to intimidate others, not to make other [67] people think they were going to be jumped and beaten but because, for whatever reason, it is part of their ceremony and that was the reason. And if you believe what Mr. Goad said, then it's going to be a real short trial.

Now, Mr. Goad has said that he has witnesses who will testify about the effect of the cross burning on them. You will hear the Judge tell you that the key here is his intent. If he did not intend to communicate a threat of imminent bodily injury, if other people feel threatened, that doesn't matter under our law. It is his intent that makes it a crime. If someone comes along who is very susceptible or very frightened, that is not a criteria. That is irrelevant.

The only issue is when he burned that cross or the cross was burned – now, I'm not even going to say he didn't burn it, here's why – because if you burn it or you cause it to be burned, you're, you're, you did it yourself. In fact, under our law, if you aid and abet someone, if you know someone else is doing an illegal act and you help them in any way, shape or form – give them a match – you've done it yourself. So it doesn't matter whether he lit it or he was there – it doesn't matter.

[68] The issue is very simple. When that cross was burned by whoever burned it – either it was Mr. Black or someone else in his group – did he burn it with the intent to put other individuals or a group of individuals in fear of imminent bodily injury or death. Period.

It's not did he stand up and say I hate you. It isn't did he shout the words. It isn't did he hold up a flag. It isn't did he demonstrate I just, I don't like certain people. It isn't a question of does he have a right to have this ceremony. The only issue is when he burned it, was he threatening people.

And in evidence of that, you can look at not only what was done, but how it was done. By their own admission, it was done hundreds of yards from the road surface and I

would submit to you that certain words can carry a threat or certain gestures can carry a threat, but the distance – it's one (1) thing for me to sit back here and say I don't like you – it's another thing to get up in your face, I don't like you. That's different. That might be construed as threatening and maybe by my behavior I intend to communicate a threat. That was not his behavior.

[69] The reason I keep talking is the issue is so simple, it's scary. Simple issues bother lawyers. This is a simple issue.

So I think at the conclusion of the evidence Mr. Black has the right to express by sign or gesture any feelings he has. That's his right as a citizen. And even if you disagree, you have sworn an oath to God to follow the law and the law says we must protect his rights. We can't protect his right to intimidate people intentionally.

I will submit at the conclusion of the government's evidence that you will find that there was a cross burning. You will find that maybe people, some of you included, might be uncomfortable by that – just like you'd be uncomfortable if the Black Muslims had a meeting or I'd be uncomfortable if Rush Limbaugh had a meeting. If these people come together and they say things that make us uncomfortable, we don't have a right to be free from discomfort. That's the disadvantage of living in a democracy. You have to tolerate other people's rights.

So they're going to have evidence that some people might have been uncomfortable. They're going to [70] have evidence a cross was burned. They're going to have evidence that people drove by – some people might have even been frightened. But there's going to be no evidence, direct or circumstantial, that he did it with the purpose of

making people feel that they were in imminent threat, a real threat of injury or death.

And I would submit no matter how you feel about the Klan, no matter how you feel about cross burning, you took an oath as a juror to follow the law. And if you follow the law, you will find there is no evidence of intent to intimidate others.

And then comes the hard part. You're going to have to follow the law and by your verdict say that what he did, even if you don't agree with it, is legal. Just like soldiers have to go to war to defend the nation and our principles, you're going to have to do the same and it's not meant to be easy, but if you follow your oath, I will submit you will find the Defendant not guilty.

Thank you.

* * *

[71] THE COURT: Thank you. Call your first witness.

MR. GOAD: Sheriff Manning.

* * *

SHERIFF H. WARREN MANNING, first being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GOAD:

Q State your name please.

A H. Warren Manning.

Q And what's your position?

A I'm the Sheriff here in Carroll County.

Q And were you serving as such on August 22nd of 1998?

A Yes. I was.

Q And did you receive a report about a Klan gathering in Carroll County on that date?

A Yes. I came home about six thirty (6:30) that evening and had a note on my door saying that [72] there was a rally, KKK rally in Cana, Virginia.

Q Right.

A And so I called my office and they told me that they had information that there was a rally going on in Cana. So I told them that I would be on my way down there.

Q And you live in the Woodlawn community?

A Yes.

Q And so after you received the report, what did you do?

A Well, I called my officers that was working to meet me on Brushy Fork Road on 690 in Cana.

Q Is that in Carroll County, Virginia?

MR. BAUGH: We'll stipulate venue, Your Honor.

THE COURT: Thank you.

A Yes. It is.

Q All right. Go ahead.

A O. K. When I arrived there, I seen a four (4) by eight (8) sheet of plyboard said *KKK Rally*.

Q Do you know about what time you got there?

[73] A Approximately probably seven (7:00), seven fifteen (7:15).

Q O. K.

A Since I seen the sign, I wanted to make sure that everything was legit and I wanted to get their attention. I could see people out in the field. So I pulled off the side of the road and I turned my blue lights on and I might have flipped my siren on for just a second so they could see me and three (3) gentlemen approached me up in a vehicle.

Q And, if you would, describe the lay of the land in this area of the county.

A Well, it was a big open field.

MR. BAUGH: Excuse me. I don't mean to cut the witness off, Your Honor. We're willing to stipulate to the admissibility of the photos they have and I believe they might be more illustrative than the description if counsel wishes to introduce them at this time or in conjunction, I have no objection.

MR. GOAD: O. K. Officer Clark took the photos, [74] but . . .

MR. BAUGH: I don't mind.

MR. GOAD: I have four (4) photos.

THE COURT: All right. We'll, Commonwealth's Exhibit #1, #2, #3 and #4.

MR. BAUGH: That will be fine. No objection to the introduction. No objection to the publication to the jury.

THE COURT: All right.

MR. BAUGH: They've been previously tendered.

THE COURT: You may proceed.

Q Sheriff, I have Photos #1, #2, #3 and #4. If you could, tell me what those photos show.

THE COURT: For the record, they'll be received as marked and you may proceed.

COMMONWEALTH'S EXHIBIT #1, a photograph of the scene of the rally in Carroll County, Virginia, is received and filed as a part of the Court record in this case.

[75] COMMONWEALTH'S EXHIBIT #2, a photograph of the scene of the rally in Carroll County, Virginia, with a mark at the approximate placement of the cross, is received and filed as a part of the Court record in this case.

COMMONWEALTH'S EXHIBIT #3, a photograph of the scene of the rally in Carroll County, Virginia, with a mark at the approximate placement of the Sheriff's car, is received and filed as a part of the Court record in this case.

COMMONWEALTH'S EXHIBIT #4, a photograph of the scene of the rally in Carroll County, Virginia, is received and filed as a part of the Court record in this case.

Q Is this showing the area where the rally was?

A Right. As I . . .

Q Now, if you could, and with the Court's permission, approach the jury and show them the photos to let them see.

[76] THE COURT: All right. And would you refer, refer to the number on the photo as you testify please?

A O. K. I'll start with this one (1) first, #3.

THE COURT: All right.

A As I came down, heading this way, from this end, somewhere in this area, in this area, there was a sign right on the side of the road here, a four (4) by eight (8) sheet of plyboard that said *KKK Rally* and I stopped right in here and I could see people over in this area of the field.

MR. BAUGH: Sheriff, not everybody down here can see at the same time.

A I stopped right here and there was a four (4) by eight (8) sheet of plyboard right here. I could see people moving and I could see a congregation of people here. So I stopped here to try to get their attention to come out to the road so I [77] could talk to somebody.

Q Was it still daylight at that time?

A No. I think it was pretty well dark at that time.

Q O. K.

A O. K. #1 here, let's see, #2, right here is a picture of a house beside this fence here. This is the field that we're talking about with a, should I go on and say what was in the field here? Is that what you want?

Q Uh-huh.

MR. BAUGH: No objection.

Q Yes.

A O. K. The cross was here, somewhere in the, somewhere in this area right here and I was back up here, the picture don't show. But that's where the cross was located.

MR. BAUGH: Your Honor, could I ask the witness to mark in pen on the photograph the location of the cross [78] where he recollects it being?

THE COURT: That will be appropriate. You may do so.

Q And indicate which photo you're marking on, too.

A O. K. This is #2. O. K. Do you want me to mark where I was parked at, too?

MR. BAUGH: Wherever. If you think it's necessary to illustrate, I have no objection. In fact, I'd ask you to.

THE COURT: This is a different exhibit? What exhibit are you marking this on?

A #3.

THE COURT: Going back to #3?

A Yes, sir.

THE COURT: Mr. Baugh, would you inspect those and make sure that we can see those marks? Would both of [79] you inspect?

MR. BAUGH: Yes, Your Honor.

Q In a couple of these photos, there's a residence in the picture. Do you know whose home that is?

A O. K. #1, this is the Sechrists', Roger Sechrist and Rebecca Sechrist.

Q And they live next door to . . .

A This is where their fence is here, their field. This is their house and the cross was here. Everybody see it? Did you see that?

MR. BAUGH: Your Honor, I have no objection to the exhibit being passed to the jury at this time. In fact, I'd ask that it be passed to the jury.

THE COURT: Do you want to publish those to the jury now?

MR. GOAD: Yes.

THE COURT: O. K. I believe we can go on with the evidence while they're looking at the exhibits. Any objection to going forward from either one (1) of the parties?

[80] MR. BAUGH: None from the defense, Your Honor.

THE COURT: All right. You may proceed.

Q All right. Let's pick back up where you first turn on your blue lights and hit your siren to get their attention.

A O. K.

Q What did you do after that?

A O. K. I was wanting somebody to come over so I could ask them some questions about what was going on and three (3) men approached me with white robes and they come up to my door of the car and I don't think I even got out and I asked them was this a legit KKK rally and he said it was.

Q Did they have hats on?

A Yes.

Q O. K.

A They, I asked them how long it was going to be until their rally was over and they said it probably, it will be another hour, somewhere in that neighborhood, hour and a half until they [81] finished their rally up.

Q Now, was Mr. Black one (1) of those gentlemen?

A At that time, I didn't know Mr. Black.

Q Right.

A But, you know, positively completely sure of it, I'm not for sure.

Q O. K. All right.

A There was just three (3) gentlemen approached my vehicle.

Q All right.

A So I told them, I said I would be around to make sure everything went well and make sure everything was, you know, law-abiding and see the rally through and I was going to stay in the community. So they went back to the rally and I went off from, where I showed you I was parked

at and just went out past the double-wide and pulled off to the right.

Q All right. Now, what did you do after you went back up there?

A. O. K. My officers and I, I had them patrolling the roads and then they was coming up sitting [82] beside me and just observing what was going on in the field. There was cars coming by me and a few cars stopped and asked me what was going on and I told them what was going on.

Q Now, were there any speeches being made during the rally?

A I could hear talk and people talking, but I couldn't tell what they were saying.

Q O. K. All right. Continue.

A O. K. Approximately probably forty-five (45) minutes to an hour we was out there and I seen a light on the lighting of a cross, burning of a cross.

Q Describe that for us and how that was done.

A Well, I was sitting there and I thought it was about over with and I seen people gathering around the cross and then all of a sudden it went up in a flame and they circled the cross.

Q And how tall was the cross?

A My estimate, estimate was twenty-five (25) to thirty (30) feet.

Q And I believe you said you were on a state road?

[83] A Yes. I was sitting on the side of the state road.

Q Clearly within your view?

A Yes.

Q Now, were there any other homes in the area?

MR. BAUGH: Objection to area, Your Honor. That's an indefinite term.

Q Within sight of the burned cross.

MR. BAUGH: No objection. Withdrawn.

A Somewhere in the neighborhood between eight (8) to ten (10) houses.

Q O. K. Now, what did you do after the cross was burned?

A My First Sergeant, Rick Clark, was with me and we called our office. I let him call the office to check the law book to see if there was, I wasn't familiar with the law on the cross burning and my office called me back and advised [84] me that there was a Code section of violation of burning a cross.

Q And what did you do after you received that report?

A O. K. Then I told, First Sergeant Rick Clark and myself, I said we need to go down there and find out what, you know, find out who's responsible and explain to them that they cannot do this in the State of Virginia.

Q Right. And so did you go into the field where the meeting was?

A Yes. I went down the driveway to the double-wide and back around to the fence. Now, the fence shows in the picture. There wasn't a major fence like that at that time. There was just a line kind of where you could tell the difference in the property lines.

Q Right.

A This fence was built after this happened.

Q These are more recent photos?

A Right.

Q Right.

[85] A And I went down to the rally and, of course, the people at the rally, you know, wanted to know what I was coming down for and I asked them, when I got out of the car, I asked them who was the leader of this rally . . .

MR. BAUGH: We're going to object to any statements made by others other than the Defendant under the Sixth Amendment confrontation clause.

THE COURT: Mr. Commonwealth?

MR. GOAD: I won't be offering any of that through Mr. . . .

THE COURT: Then you withdraw the question?

MR. GOAD: I'll just ask him to focus in on the Defendant.

THE COURT: All right.

Q Did the Defendant approach you when you first asked the question?

A Yes. He did.

Q And is that Mr. Black sitting over there?

A Yes.

[86] Q And did he still have the robe and the hat on?

A Yes.

Q All right. And what was your question?

A I asked him who's the head of this rally and he said I am.

Q And when you're saying who, he?

A Mr. Black said.

Q O. K.

A And I asked him if he, who was responsible for burning the cross and he said I guess I am because I'm the head of the rally and I said well, there's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this and my First Sergeant, Rick Clark, was there and I took, took him to Rick Clark and he proceeded to arrest him and put him in his car.

Q O. K. Now, did any individuals at the scene seek assistance or protection from you while that was going on?

A When I was there talking to Mr. Black and right after the First Sergeant took Mr. Black over to [87] his car, neighbors in the double-wide came up to me and it, they was real, had this fear on their face . . .

MR. BAUGH: Objection, Your Honor.

THE COURT: Sustain the objection.

MR. GOAD: He can testify to what he saw.

MR. BAUGH: He cannot . . .

MR. GOAD: To their facial expression.

THE COURT: Sustain the objection.

MR. BAUGH: Thank you. Ask the jury be instructed to disregard.

THE COURT: So instructed.

MR. BAUGH: Thank you, Your Honor.

THE COURT: Members of the jury, disregard the last comment.

Q Did they seek protection?

MR. BAUGH: Objection, Your Honor, unless there's a basis and it gets dangerously close to confrontation. If the people are here, they can testify [88] to what they came and asked for.

MR. McLEES: Your Honor, it's not a hearsay situation. It's a verbal act on their part if they came to him and asked for protection. He can, he can tell what they said because it's a verbal act. It's not offered for the truth of the matter.

MR. BAUGH: I'm not objecting at this time to being double teamed, but I will next time. Your Honor, there are some, in grammar, there are some words which do not carry with them a question. They do not carry with them a declaration. The statement that he asked clearly calls for a declaration and that would be violative of the Sixth Amendment right to confrontation. If they're here, they can testify. It is a hearsay exception and, more

importantly, it's a confrontation exception and a confrontation objection.

THE COURT: Anything further you want to add?

MR. McLEES: The confrontation clause is not violated by the traditional firmly rooted, common law hearsay exceptions and this is one (1) of them.

THE COURT: Sustain the objection.

Q Answer anything Mr. Baugh might have.

[89] CROSS EXAMINATION BY MR. BLACK [sic]:

Q Sheriff Manning, on this sign announcing the rally, did it say words on it like it was private or anything like that? Do you remember the words that were on it?

A The best I can recollect, it did have *private*, I believe, on that sign.

Q O. K. During the time you were out there, sir, the hour and a half before the cross was lit, first, did you see the cross erected? Did you see it standing there?

A No. It was dark and I really didn't see until it was, until they set it on fire.

Q I thought – and correct me if I'm wrong – that you said that you saw them circle the cross, they got around the cross and then you saw the cross lit, but you, I believe you said you saw them circle the cross first.

A Well, at the time, I seen them circle, but I [90] didn't, my mind wasn't focused on the burning of a cross at that time.

Q You were familiar with the fact – am I correct, sir – that a cross burning is not, it's not a disassociative thing with the Klan? I mean, that sort of thing happens in Klan rallies. Right?

A Right. But we've never had one (1) in Carroll County.

Q O. K. And during that hour and a half, did you ever think, well, let me ask you this, did you know it was a crime during that hour and a half you waited to burn a cross?

A No. No. Not until I called my office.

Q And that's how come you didn't tell them it's a crime to burn a cross because you didn't know?

A That's right.

Q All right. Did the members of this rally do anything in contravention of your orders or directions during the time you were there? Did they, were they difficult with you?

A No.

[91] Q Whose field is that in which the cross was burned?

A I'm not for sure the lady's name, but it was Joey Sechrist's mother.

Q And had you had, had you had any complaints about trespassing or any allegation that the Klan people were there without permission?

A No.

Q All right. So your investigation indicated they were there with permission?

A Yes.

Q All right. And they stayed on the portion of the property for which they had permission?

A As far as I know.

Q All right. Now, during the whole time you were there, were there any, were there any members of the gathering dressed in their sheet things?

A Was there any more than Mr. Black?

Q Uh-huh. Anybody?

A Everybody was.

Q All right. And weapons on the part of them?

A I did not search anybody but Mr. Black.

[92] Q Did you see any weapons out there?

A I did not see no weapons.

Q Did you see any overtly threatening gestures or signs?

A No, sir.

Q Did you feel, well, let me ask you this. Do you agree with the views of the Klan?

A No.

Q Did you perceive what was going on as a threat of imminently bodily injury to you? Did you feel you were going to be attacked?

A By the burning of the cross, is that what you mean?

Q Uh-huh.

A Just by the actual burning of the cross?

Q Uh-huh.

A It, not maybe by the actual burning of the cross.

Q Thank you. Well, we're here about the burning of the cross, aren't we? That's the reason we're having this iittle party. Right? You have to say yes or no, sir.

[93] A I didn't catch the question. Say it again.

Q O. K. The reason we're here, the reason he was arrested was about the burning of the cross. Right? It wasn't about wearing the percale and walking around and all that.

A Just burning the cross. Yes.

Q O. K. Thank you. Pass the witness.

AND FURTHER THIS WITNESS SAID NOT.

MR. GOAD: No additional questions.

THE COURT: Are you going to recall?

MR. GOAD: Possibly.

THE COURT: We'll need for you to wait then in one (1) of the outer rooms. Don't, don't go back in the same room with the other witnesses and don't discuss your testimony.

[The witness, Sheriff H. Warren Manning, is again excluded from the courtroom and from the hearing of any of the matters therein.]

[94] THE COURT: Next witness.

MR. GOAD: Judge, I would request a conference in chambers for a brief moment on a matter.

THE COURT: All right. Let's go to chambers and the Defendant is welcome.

* * *

IN THE COURT'S CHAMBERS – OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, Ms. Davis, and the Defendant, Barry Elton Black.]

MR. GOAD: Judge, in the opening statement of counsel, he stated that the intimidation, intent to intimidate others required an imminent threat of injury or death and he again asked that question on cross examination of Sheriff Manning and it's our position that's not the accurate description on what is an intent to intimidate. There had been some discussion about this on the jury instructions and Mr. Baugh forwarded one (1) [95] to me previously which we were not going to object to which did not contain the threat of, imminent threat of injury or death and then yesterday we received some new ones that did and it's our position that that is not an accurate statement of the intent to intimidate and with that being in the opening and then on cross examination with the Sheriff, I felt like we ought to address that now.

THE COURT: What do you have to say?

MR. BAUGH: I didn't hear an objection. I don't know what I'm answering to. Did I say it? Yes. I don't know what I'm, what do you want to know?

MR. GOAD: I'm objecting to anything further.

MR. BAUGH: Your Honor, I said it about six (6) times during *voir dire*, at least ten (10) times during opening without objection, if the Court's going to rule we can't do that after we opened with it and we've *voir dired* on it, we'll move for a mistrial now because I can't change tactics in the middle of a trial.

THE COURT: What did you say in your briefs? Wasn't, do you have a copy of your brief that you filed? Wasn't that . . .

[96] THE CLERK: Do you want the Court file?

MR. GOAD: I do on my desk.

THE COURT: O. K. Could I see the briefs? I thought that was one (1) of the things that you said in your, in that brief.

MR. McLEES: Your Honor, we said that the intent to intimidate involved a, putting people in fear and I think we said in fear of injury. We don't have any problem with that. I think our objection is with Mr. Baugh's gratuitous injection of this element of fear of imminent danger. It doesn't have to be imminent danger. The law doesn't, the statute doesn't say that and the Constitution doesn't require that.

MR. BAUGH: Your Honor, we have two (2) new cases. The reason I didn't do them earlier – in completing

the instructions, in the instructions I filed on June 10th, as per your direction, I did use the word *immediate* which I take as analogous to *imminent*. Additionally, I did submit – we had some faxed, I left, I forgot them and I had, and Mr. Goad permitted me to have them faxed over to his office for delivery to me – there is a new case or cases that were referred to us by the [97] Jefferson Institute at the University of Virginia – one (1) is called *Baker*, the other one (1) is, was it *Hefler*? H-E-F-L-E-R. I have copies in my briefcase.

MS. DAVIS: *Kessler*.

MR. BAUGH: Was it?

MS. DAVIS: That's the case – *Kessler*.

MR. BAUGH: *Kessler, Kelfer*, something like that, and I have copies. Both of them say that in order for it to be, to intimidate, there must be a, quote, "*true threat of imminent bodily injury or death*" in order, to escape the protection of the First Amendment. I mean, as the Court is well aware – just saying I hate people isn't enough. It must be calculated.

It's like the yelling of fire. It must be calculated to elicit a reaction at that time and it is the prevention of the action occurring which takes it outside the First Amendment. To just make a statement that somewhere way down the road may cause a reaction, to scream fire in an open field, for instance, is not a violation of the First Amendment.

The same thing here, it has to be imminent. It must be a threat of serious bodily injury and I believe [98] the government conceded some of that issue in their brief.

THE COURT: Give me a minute while I find the brief . . .

MR. BAUGH: Yes, sir.

THE COURT: Let me have some comment with regard to the Commonwealth's statement in the Brief in Opposition, this language appears: "*The Virginia statute at issue outlaws*", this is emphasized, "*threats of violence, not mere incitement to violence or fighting words*". Then it goes on and "*Black now unreasonably pounds his figurative fist at Brandenburg vs. Ohio*", et cetera, "*which involved an attempt to outlaw advocacy of lawless actions of others rather than direct threats. He cavalierly ignores the abundance of authority that direct threats of violence, unlike mere advocacy, are outside the First Amendment*".

Aren't you saying that we need the – in your own briefs – that you need the direct threats?

MR. McLEES: We're saying it needs to be something that expresses a direct threat, but not a threat of imminent harm. The imminence is what we object to here. He's trying to get in through the back door what he [99] couldn't through the front door. He argued over and over again that it was this clear and present danger test. Your Honor correctly ruled the clear and present danger test is not involved in this kind of statute.

One (1) can violate the law by threatening future harm. It doesn't have to be imminent harm. We've got not only this statute in Virginia. Your Honor knows we've got a statute that makes it a felony to communicate a threat to burn a building by the telephone. Now, if you call somebody on the telephone and say I'm going to burn your house in the next county, there's not an imminent threat

involved, but that is still, there's not an imminent, you don't have to show an imminent danger to show that that is a felony to communicate that threat. You can say I'm going to burn it next year.

There is a, it is a felony to extort people with the suggestion that if they don't do what you want them to do, you're going to accuse them of some kind of heinous crime. That doesn't have to be a statement that you're going to do it right now or that the harm to them is going to be imminent. There are all sorts of different ways of intimidating people, of threatening harm – now, in the [100] future, to them, to somebody else. All the law requires is that the Defendant's intent be serious – that he actually intend to frighten people with this expression of threat. It doesn't require that it be imminent danger and it doesn't require that he have the actual capacity to carry through on the threat. It's just the intimidation of some sort of threat of harm.

MR. BAUGH: Your Honor, briefly, and I think this might resolve the issue. I'm citing from another case I've not tendered, but I will be glad to, *U.S. vs. Baker*, which is 890 Fed Sup 1375, Eastern District of Michigan, 1995, but I'm referring to the quote in *Brandenburg* which you just indicated they cited. Quoting from *Brandenburg vs. Ohio*, which is 395 US 444, reading from Page 447, "*The constitutional guarantees of free speech and a free press do not permit a state to permit or prescribe advocacy of the use of force or of law violation except where efficacy is directed in inciting or producing imminent lawless action and it's likely to incite or produce such action.*"

Further, if you read on in the case, you'll see the other thing about true threat, the whole case, at the [101] top of

the column over here, true threat, what it means, true threat means serious bodily injury and I will give the highlight, this is a quote from *Brandenburg* which they cited in their brief and it clearly says it has to be imminent.

MR. McLEES: Your Honor, *Brandenburg* is a fighting words case. It's back, he's trying to get in the back door what Your Honor has already rejected through the front door. This is not a statute against advocacy of violence or advocacy of overthrowing the government. This is a statute against trying deliberately to actually scare people. So the *Brandenburg* language quoted in that case is not involved here.

Now, Mr. Baugh has not graced us with the *Baker* case. He hasn't graced us at all with the *Kessler* case that he mentioned. I have no idea what that is. The only reason we know about the *Baker* case is because that he, he submitted to Mr. Goad this jury instruction which is incorrect which has the *Baker* case incorrectly cited at the bottom of it and I called my office and they found the correct cite and faxed me the case.

It appears to me, from what I've been able to [102] glean this morning, a Sixth Circuit case involving a federal statute with Sixth Circuit case law on it. That is not good law in the Fourth Circuit. It's not good law in Virginia. If Your Honor were to adopt this standard here, then not only is this statute unconstitutional, but the telephone threat statute would be unconstitutional, the extortion statute would be unconstitutional. It simply is not a requirement – when someone is actually expressing a threat and seriously trying to scare people, it is not a requirement that it be an imminent danger, that the

person be and put in fear that they're going to be hurt right now. It could be some time in the future in some other place.

THE CLERK: Is this what you're looking for?

THE COURT: Is it Commonwealth's?

THE CLERK: No. That's Mr. Baugh's.

MR. BAUGH: That looks like my response, Your Honor.

THE COURT: I'm really looking for the Commonwealth's . . .

THE CLERK: Oh, I'm sorry. I thought you were looking for his.

[103] THE COURT: No. Let me look again. In your, in the Commonwealth's brief, we have this, this additional language: "*Intimidation as used in such statutes means putting one (1) in fear of bodily harm*", now, this is what you've agreed to, this is your, your memo in stating that it's not vague and it's not overbroad.

MR. McLEES: We do agree to that, Your Honor.

THE COURT: "*Moreover, even if the English language permitted a broader interpretation for the word intimidating, principles of statutory construction would require this Court to construe the word narrowly, as stated above, and thus uphold the constitutionality.*" I believe that's the only thing . . .

MR. McLEES: We do, we do agree to that, Your Honor. The entire controversy here is over his use today of the word *imminent*.

THE COURT: I understand that.

MR. McLEES: And where he's going with that, of course, is that he's going to say well, there's no threat of imminent harm because there was nobody there at that point that they were, that they were about to assault and he's already started down that road and that's not the [104] standard. If the, the black family in the car drove past this, this burning cross and saw it and got frightened and sped away because they, they were frightened of it and it frightened them that some future harm might come to them because this is building up racial animosity in this county, that's sufficient to show intimidation, but he's going to say it's not. If people, if the word is spread throughout the community as a result of this that there's an active KKK chapter in Carroll County and you better watch your step and not walk down the street holding hands with somebody of a different race, that's intimidation, but he's going to say it's not. And that's not the law.

MR. BAUGH: Your Honor, if the Commonwealth is asserting that the purpose of this statute is to forbid racial animosity, I will gladly take that record to the Supreme Court. It is illegal to try to outlaw animosity and that is what he's arguing. Your Honor, in order for you to rule the way they just said, you must knock out the imminence requirement of *Brandenburg* and you must knock out the language of their own brief concerning bodily injury and unless you're willing to deny *Brandenburg* which is U.S. Supreme Court – and, by the way, Sixth Circuit [105] did, I mean, we did cite, that was a Sixth Circuit case and I provided it to the Court only for direction because of the, some of the questions in the statute – but if the Court is going to rule that *Brandenburg* is not the law and the government, and I cannot rely on the

government's representations in its brief, then we're still going to have to, we're going to have to continue the case and declare a mistrial, but I would submit the Court cannot overrule *Brandenburg* and their assertion, the government's assertion in that brief concerning the requirement of bodily injury, the, the interpretation to require that is valid and that is what I have argued – *Brandenburg* and the assertions they have made in their brief.

MR. McLEES: Your Honor, we're not going back on our brief one (1) iota. It requires a threat, it requires intimidation, but it doesn't have to be imminent and *Brandenburg* has nothing to do with this case because this is not a fighting words case. This is not a case where he's being prosecuted for advocating a point of view. It's a case where he's being prosecuted for trying to scare people.

But we don't have to show that he intended to [106] make people think that they were going to be subjected to violence in the next five (5) minutes and that's what he's trying to plant in the jury's mind. He's trying to mislead them.

THE COURT: The Court's going to sustain the objection. I had overruled the clear and present danger test and I think that's what we're getting into when you talk about imminent danger. It has to be a threat of violence, but the imminence – as if it's going to happen in the next five (5) minutes or the next hour – I don't think that's a requirement.

MR. BAUGH: I'll move for a mistrial. I can't change. I've already voir dired this jury and questioned on it.

MR. McLEES: Your Honor, he misstates the law three (3) times and we call him on it on the fourth one (1) and he thinks he's entitled to a mistrial? With all due respect, it's nonsense.

THE COURT: I'm going to deny that motion. No need to argue that. Motion for a mistrial is denied.

MR. BAUGH: Your Honor, I believe that the government has waived their objection.

[107] MR. McLEES: We have not.

MR. BAUGH: They have correctly stated the purpose of this advocacy is to outlaw racial animosity. We told you earlier that was the purpose of this statute. They have acknowledged it. Your Honor, you sat in, if they had objected, we would not be in this posture. They didn't.

I am still of the opinion that under *Brandenburg* – and you can't say that language is not there – I'm still of the opinion, I have always been of the opinion that that is the law. Now, they didn't object. They have to eat it.

I move for a mistrial. It can't be cured. How are you going to cure it, Judge?

THE COURT: I'm not going to try to cure it.

MR. McLEES: There's nothing to cure.

THE COURT: I'm going to deny the motion for a mistrial. We will go forward and we'll, we'll try this case and see what happens.

MR. BAUGH: Your Honor, I have to know, I have to know the direction then. If you're going to permit them to say that the earlier assertions upon which I made

[108] my argument are unfounded, then you have just negated opening. Shall we start again?

THE COURT: They can, when the time comes, if we get this far, when the time comes to get the instructions ready, they can argue to that jury that the Court's instructions are as follows and this is the law of the case. What, I'm not going to permit them to argue to the jury that you misstated the law in your opening statement. The law of the case is whatever the Court tells the, tells this jury the law is when I get to that point. Now, I'm not going to let you criticize his assertion of what the law was at the opening statement.

MR. McLEES: We have no objection to that.

THE COURT: It was probably objectionable. When you try to tell the jury what the law is in your opening statement, you run the risk that the Judge may not agree with that.

MR. BAUGH: Well, that someone might object.

MR. McLEES: That's exactly right.

THE COURT: That's right. Someone can always object and we can get it straightened out right then. That's the Court's ruling. Let's go finish our evidence.

[109] * * *

IN THE COURTROOM – IN OPEN COURT

BAILIFF: All rise.

THE COURT: Thank you. Just be seated please.

Call your next witness.

MR. GOAD: First Sergeant Rick Clark.

* * *

FIRST SERGEANT RICHARD C. CLARK, JR., first being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GOAD:

Q State your name please.

A Richard C. Clark, Jr.

Q And what's your position?

A I'm a First Sergeant employed by the Sheriff of [110] Carroll County.

Q And were you serving as such on August 22nd of last year?

A Yes. I was.

Q And were you called upon by the Sheriff to go to the Cana section of the community?

A Yes, sir. I was.

Q And what was the purpose of that?

A I was called by radio and told to meet the Sheriff on Brushy Fork Road which is State Road 691 in the Cana section of Carroll County. When I arrived there, I met him at a store, an abandoned store and he told me that there was a meeting of individuals that he wanted us to watch and to be in the area.

Q And did you see individuals in that area?

A Yes, sir. He instructed me to patrol up and down the road, from north to south. As I started back on the road, there were two (2) people in white robes and pointed hats standing on the side of the road beside a sign that said *KKK Rally*.

[111] Q Do you recall if the sign said anything else on it besides . . .

A No, sir. I don't.

Q All right. And what did you do at that time?

A I continue to patrol up and down the road. At one (1) point, we went to the, it would have been the northwest side of where they were at and we started watching where they were at – they had gathered around a cross. I called the dispatcher and that – I knew that there was a cross burning statute, but was not familiar with it – I called the dispatcher and asked him to look up the Code Section and to call me back and read the Code Section to me when he found it.

Q Can you tell us how many people were at this gathering?

A It appeared to be twenty-five (25) to thirty (30).

Q And were they all dressed similar?

A Yes, sir. They appeared to be.

Q And what did they have on?

A White robes and white hats.

[112] Q And so what did you do after you received your radio report back about the statute?

A Prior to him calling me back, they had been standing around a cross that was in an open field. They moved in unison to the cross and lit the cross and it was flaming. He called me back and read the statute. When I told the Sheriff what the statute was, he instructed me to go with him across the field where we went forward toward the group. He asked who was in charge and Mr. Black came forward and indicated that he was.

Q Right.

A We placed Mr. Black under arrest for burning a cross.

Q And what did you do after that?

A I took him back to my police vehicle. I searched him and placed him into the vehicle and I was instructed by the Sheriff to bring him back to the jail to complete the arrest process.

Q Right.

A To do so, I had to travel back to State Route [113] 691 where we had general conversation all the way back up the road. He spontaneously, as we approached Route 691, said *when is the white man going to stand up to the blacks and Mexicans in this area*. I asked him to clarify his statement and he told me he was lead to believe that the blacks and Mexicans were walking up and down the sidewalk with white women holding hands and taking all the jobs.

Q Right.

A I told him there weren't any sidewalks in Cana, Virginia.

Q Uh-huh.

A And he said he'd seen it that afternoon. I told him there weren't any sidewalks in Carroll County, Virginia in the Cana section and he indicated, I understood that he had stayed in the Mount Airy section where there are sidewalks and he seemed surprised that he was in Virginia.

Q Right.

A We talked all the way back up the road to the jail. It took fifteen (15) to twenty (20) [114] minutes at that time of night, but when I got to the jail, I completed the arrest process and took him before a magistrate.

Q O. K. Now, did any individuals drive by while you were observing the gathering?

A State Route 691, there was a normal flow of traffic. Some people would drive by and holler out the window. There was a black family that drove by. They stopped and took off. Probably, in the hour that I was there, there was probably forty (40) to fifty (50) cars came by.

Q Now, when you say stopped and took off, what do you mean by that?

A Stopped and looked across the field and then they took off.

Q Was the cross burning at that time?

A Yes, sir. It was.

Q And how tall was the cross?

A Twenty-five (25) to thirty (30) feet.

Q And what type of distance did you see the glow of the cross go?

A We were standing probably three (300), three [115] hundred (300) to three hundred and fifty (350) yards away.

Q Right. Clearly visible from where you were at?

A That particular stretch of road's probably three-fourths of a mile and you could see it, one (1) end of the road cuts left and right, down a hill and up a hill, one (1) end of the road goes down a hill, you could see it from both ends of the road. It was probably visible at that particular point a half mile in each direction.

Q Right. When you talk about this family stopping and taking off, are we talking slowly, quickly or what?

A When they came up to us, the Sheriff had his blue lights on because we were on the side of the road.

Q They slowed at our location. When they found out that we didn't want anything, they appeared to be upset and took off.

MR. BAUGH: Objection to *appeared to be upset*, [116] Your Honor. That is improper. We ask the jury be instructed to disregard.

THE COURT: Sustain the objection. Disregard the statement, members of the jury.

MR. BAUGH: Move for a mistrial.

THE COURT: Denied.

MR. BAUGH: Note my exception.

Q What was the speed of the vehicle when it left?

A They left at higher than a normal rate of speed. I, they didn't speed or spin their tires when they were going away.

Q O. K. Answer any questions that Mr. Baugh might have.

CROSS EXAMINATION BY MR. BAUGH:

Q You saw the cross in the ground before it was lit, didn't you?

A Yes, sir. I did.

Q And based upon your years of life, you're not surprised to hear the Klan burns crosses, do [117] you?

A I was surprised to see it in Carroll County. Yes, I was.

Q Yes. But you know it's not uncommon for the Klan to burn a cross?

A I know they burn crosses. Yes, sir.

Q All right. You didn't know for sure it was illegal until after it was lit. Am I correct?

A I knew there was a statute. I didn't know what the statute said.

Q All right. And, but you didn't even ask, well, how long were you there in the presence of the unlit cross?

A Twenty (20) to thirty (30) minutes.

Q And how long were you there before you called dispatch and asked them to look up the statute?

A Ten (10) to fifteen (15).

Q So you're not saying that if you had gone over and told these people it was illegal to burn the cross, they were going to burn it anyway?

MR. GOAD: Objection. Speculation.

[118] MR. BAUGH: Withdrawn.

Q Sir, you don't, you don't speak for all black people, do you?

A No, sir.

Q They don't have a meeting and elect you representative, do they?

A That's correct.

Q Or Hispanics, for that matter?

A That's correct.

Q So when you say a black family came up and drove away, you don't know if they drove away because they felt threatened or they were laughing at a percale posse that was standing around a burning stick, do you?

A I just had my personal opinion.

Q You had your opinion. However, you know when you're on the stand because you're a trained officer – we've both been doing this for years – we talk about evidence, don't we?

A That's correct.

Q All right. You don't have any evidence of that, [119] do you?

A No, sir.

Q Thank you. Now, how many officers were out there while the cross was burning?

A Myself, Sheriff Manning and Deputy Sheriff Larry Hall.

Q And you say there were how many people on the, members of this, members of the group around the cross?

A Twenty-five (25) to thirty (30).

Q All right. Did you get out of your vehicle?

A Yes, sir.

Q Did you walk around?

A At which point, sir?

Q I mean, did you, I mean, during the twenty (20) minutes you were t here [sic], did you walk around your car? Did you walk to one (1) side of the street, back, forth, observe what was going on?

A On more than one (1) occasion, yes, sir.

Q All right. Did you pull your shotgun out of the car?

A No, sir.

[120] Q Did you understand that burning a cross was part of their ceremony?

A No, sir. I didn't know much about the Klan.

Q All right. Oh, were the people at this rally making statements?

A I could hear people talking, but from the distance that I was at, it was unintelligible.

Q Am I correct then that, were they using any type of amplification device?

A There was a generator running and you could tell somebody was talking over a PA, but I couldn't understand the words.

Q So you don't know if anyone was advocating violence, anyone was advocating bodily injury, if they were praying, you have no idea what was being said, do you?

A I couldn't understand a word, sir.

Q All right. And you were out of your vehicle?

A On more than one (1) occasion.

Q That's right. And you were certainly no more closer than the people who were driving by?

A No, sir.

[121] Q According to the response we have here on the Bill of Particulars, the government advocates that, do you personally agree with the philosophy of the Ku Klux Klan as you understand it?

A Absolutely not.

Q And did you feel threatened by their actions?

A I felt moral, moral outrage.

Q That's a nice answer, but perhaps you could answer my question. Did you feel threatened?

A For my personal safety, no, sir.

Q Thank you. Pass the witness. No further questions.

AND FURTHER THIS WITNESS SAID NOT.

THE COURT: Any further questions?

MR. GOAD: If I could have just a moment. No other questions at this time. We'd like to reserve the right to recall.

THE COURT: All right. We'll ask you to remain in the witness room until you're recalled and don't [122] discuss your testimony with anyone.

SGT. CLARK: Not with the other witnesses?

THE COURT: Well, the two (2) that's testified can stay together, but not with the ones that have not testified.

[The witness, First Sergeant Richard C. Clark, Jr., is again excluded from the courtroom and from the hearing of any of the matters therein.]

THE COURT: Next?

MR. GOAD: Rebecca Sechrist.

* * *

REBECCA SECHRIST, first having duly affirmed her oath to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GOAD:

Q Good afternoon.

[123] A Hi.

Q State your name please.

A Rebecca Sechrist.

Q O. K. And, Mrs. Sechrist, if you would, scoot up a little bit so we can pick up the voice on the mike so everybody can hear. Where do you live at, Mrs. Sechrist?

A In Cana. Cana, Virginia.

Q That's in Carroll County?

A Yes, sir.

Q And your husband's name is Roger?

A Yes, sir.

Q And did you live in that area on August 22nd, 1998?

A Yes, sir.

Q And were you at home that day?

A Yes, sir. We wasn't, we wasn't home that day, but we was home that evening.

Q Right. What time did you get back home?

A About four o'clock (4:00), between four (4:00) and four thirty (4:30).

Q And what did you find once you got back home?

[124] A Well, right beside our house, it was all roped up, off, and we at first thought it was a, somebody going to build something or something and then when we asked my mother-in-law and she said that they were having a Ku Klux Klan meeting.

Q Right.

A Yes, sir.

Q Did you see any sign indicating that?

A Not until late that evening, later, you know, right before it.

Q Uh-huh. Now, this was not on your property?

A No, sir.

Q Property that adjoins you?

A Yes, sir.

Q And did you see any individuals out in the field?

A Yes, sir.

Q And what were they doing?

A Putting a cross together.

Q Right.

A And they were just hanging out, you know, but [125] most of the men were putting a cross, a big cross together.

Q Right.

A And they had little kids and everything out there helping.

Q Right.

MR. GOAD: If I may approach the witness?

THE COURT: You may.

Q I have in my possession Exhibits #1 through #4. I have at this time Exhibit #2 and there's a house in the corner of the picture.

A That's our home.

Q O. K. Now, I understand that you all were actually not living in it at that time?

A No. They just had brought it that week and set it down.

Q And your husband's parents live next door?

A Yeah. On up the hill, up this way.

Q Right. So you were actually staying with them and getting ready to move in?

[126] A Yes, sir.

Q O. K. And who owns the property next to you?

A Joey Sechrist or Anna Lee Sechrist.

Q And that's his mother?

A Yes.

Q O. K. And were you present in the area from four o'clock (4:00) that afternoon on into the evening?

A Yes, sir.

Q And what did you do during that time?

A Mostly sat and watched to see what's going on.

Q Right.

MR. GOAD: If I may approach again?

THE COURT: You may.

Q On Exhibit #2, there's been a notation by the Sheriff of the general area of where the cross was erected at. Does that appear accurate?

A Yes, sir.

Q O. K. And you would agree that it's a pretty flat terrain area from the road area?

[127] A Yes, sir.

MR. BAUGH: Your Honor, the photograph will speak for itself.

MR. GOAD: Yes.

THE COURT: Sustain the objection.

Q Now, in this part of the picture, it appears to drop down on the back side. Do you know the lay of that land back in that area?

A Now, right in here, it kind of goes down, but it goes back up on, behind these trees and it's kind of flat, you know, pretty flat out back behind the trees.

Q Right. Is that an open field in that dip on the back side?

A Right here?

Q Right.

A Not right here, it's not, but on the back side of these trees, it is. You can see it like from right behind our trailer and look around these woods, you can see how open it is back there.

[128] Q Right. And that's still the property of Joey Sechrist's mother?

A Yes, sir.

Q Now, if a person was back there, could they be seen from the public road?

A No. No, sir.

Q O. K. Did there come a point where various speeches began being made from the group?

A Yes, sir.

Q And was there a PA system or just people speaking or what?

A They had a PA system. You know, before, before they put the robes and stuff on, they just, you know, talked, but after they put the robes on, they had a PA system and a stage.

Q Uh-huh. So when the speeches were being made, the robes were on?

A Yes, sir.

MR. BAUGH: Objection to speeches, Your Honor. I don't believe she's testified to that. That's assuming a fact not in evidence.

[129] THE COURT: Sustain the objection.

Q Did there come a point where you heard statements being made from the group?

A Yes, sir. All of them that had . . .

Q Excuse me. Let me jump in for a second. And at that time, were the robes and the hats on?

A Yes, sir.

Q All right. And do you know how many people spoke?

A All that had the robes on got up and said a, a little speech about what they were there and what they believed in and stuff.

Q Right. Did you hear any threats being made from those statements?

MR. BAUGH: Objection unless they came, they were coming from my client, Your Honor. I don't want my client being held responsible for statements made by others.

MR. McLEES: Your Honor, . . .

MR. BAUGH: I'm going to object to being double-[130] teamed finally. Whoever is going to handle the questions is going to handle the objection.

MR. McLEES: I think that's entirely up to the Court. I think that's within the discretion of . . .

THE COURT: I think it's appropriate that, Mr. Goad is asking the questions, so let him state the objection.

MR. BAUGH: Thank you.

MR. GOAD: Judge, to begin with, he's waived that objection during his cross examination of Investigator Clark. He asked him were there any statements made by the individuals that he could hear. He also asked were there any threats that were made from the rally. He's opened the door on this issue and he can't object to the testimony regarding that very same issue at this time.

And, secondly, it's an adopted admission by the Defendant. It's already in evidence that he's admitted that he was the leader of the Klan rally, that he was responsible for the burning of the cross, thereby he's made an adoptive admission of what the speeches were made during this rally.

[131] MR. BAUGH: Do I understand it correctly if I'm a member of the Democratic party and someone says something, then that means I'm saying it as well? Your Honor, that is not only not a proper evidentiary argument, that's illogical. Additionally, Your Honor, I would point out that I asked the officer not what were the contents, I said were they made. He said no. If I had gone into what statements were made, counsel should have objected because that would have been impermissible. But this, he's now trying to find out what was said and that is a violation, unless they have a recognized common law hearsay exception that overcomes the presumptions of the confrontation clause, that is impermissible.

THE COURT: Any further comment?

MR. GOAD: Just the test for the adoption, the adoptive admission is whether a person similarly situated would have felt themselves called upon to deny the statements effecting them in the event they did not intend to express acquiescence by the failure to do so. With these statements being made at his rally, I think these are relevant as adoptive admissions.

MR. BAUGH: If this lady's, first, I'm not [132] saying that's valid, but even then, I haven't even heard them say he was present at the time these statements were made. May I take her on *voir dire* to make determination and then the Court can rule?

THE COURT: You may.

VOIR DIRE EXAMINATION BY MR. BAUGH:

Q Ma'am, did you see this lady, this man here when the speeches, you say, were going on?

A Yes, sir.

Q Do you recognize him? You saw him the whole time?

A He was there and then after, now, after they put the robes on, I couldn't tell you who was who.

Q And so you said that while the speeches, they put their robes on and started giving speeches. Right?

A Yes, sir.

Q So you don't know if when the speeches were going on, he was there or not. Right?

A No. I couldn't recognize him after the robe was [133] on.

Q Thank you.

MR. BAUGH: Re-urge the objection twice.

THE COURT: Do you have any questions you would like to ask with the, with, in that regard?

MR. GOAD: No, sir.

THE COURT: Anything further you want to say about it?

MR. GOAD: No, sir.

THE COURT: I'm going to overrule the objection. You may proceed.

MR. BAUGH: Note my exception.

THE COURT: Yes, sir.

CONTINUED DIRECT EXAMINATION BY MR. GOAD:

Q O. K. Mrs. Sechrist, if you would, go forward and tell us what threatening statements you heard being made at the . . .

MR. BAUGH: Objection to the characterization of [134] threatening. She can say what she heard.

THE COURT: Sustain the objection. Don't lead the witness. You can ask her what she heard and she can tell us.

MR. GOAD: Yes, sir.

Q What statements did you hear?

A They were real, they were real, talked a lot about blacks – and I don't call them the word they called it, they called it, it started with an *N* and I don't, I don't use that word, I'm sorry – but they talked real bad about the blacks and the Mexicans and they talked about how one (1) guy got up and said that he would love to take a .30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and the Mexicans back from where they come from and talked about President Clinton and Hillary Clinton and about the government funding money for the, for the people that can't afford housing and stuff and if they, their tax, how their tax paying goes to keep [135] the black people up and stuff like that.

Q Right. And how did this make you feel?

A It made me feel very, I was scared. I was, I was, there was people down at the road hollering and then them up there talking about stuff like that and, you know, all these people were hollering that thought we had it in our back yard because, see, they just brought our home that week and set it down and they were hollering, they don't see how these people can move in . . .

MR. BAUGH: Object, Your Honor. We're now going to statements from people who were not in the rally.

THE COURT: It sounds that way.

MR. GOAD: That would be a proper objection.

THE COURT: All right. Sustain the objection.

Q How did the burning of the cross make you feel?

A Oh, it made me feel awful. It, they all walked around and then they would go in one (1) circle and say things and then they would go around in [136] another circle and say things and then they went up and all met at the bottom of the cross and lit it and played *Amazing Grace* and I tell you what, I was just, it was just terrible. It was terrible to see, that, when they were talking about random shooting black people and all, the guy that said it and everything talked about killing people and then get up there and said that when he died, he knowed, that he was a good Christian and when he died, he knowed he was going to heaven and then to burn the cross like that, I just, I just, I couldn't begin to put in words how I felt. I cried, I sat there and I cried. I didn't know what was going to happen between everything going on. It was just terrible.

Q You know, when you said earlier that you were scared, what were you scared of?

A I was scared our home would get burned or something would happen to it. We've got two (2) kids and I was afraid that something would happen to them because they're, they've got [137] their license, they're out by theirself and, I mean, you know, for weeks after this happened, we had trouble with people riding by, stopping in the middle of the road, hollering white power and just, you know, we had an awful time and we didn't know what to expect.

Q Right.

A And we was just afraid one (1) day we'd get up and our house burned or get shot at or something, we didn't know what to expect.

Q How long did that feeling go on?

A It went on for at least, for a couple of months and then after the cold, cold weather, you know, they got to where that, it never failed that, every time we, like I said, they just put our home in and we stayed outside working on it a lot and when they would see us out, it seemed like it would just start, every little bit, riding by hollering.

MR. BAUGH: Objection again, Your Honor. These are statements by people other than those at the rally. [138] They should be excluded. We'd ask the jury to be instructed to disregard.

THE COURT: Do you agree with that, Mr. Commonwealth?

MR. GOAD: Yes, sir. She hadn't said it yet and I agree that it is a proper objection.

THE COURT: Members of the jury, the statements attributed to other people after the rally, disregard all those statements and don't consider it in arriving at your verdict.

Q O. K. Answer any questions Mr. Baugh might have.

CROSS EXAMINATION BY MR. BAUGH:

Q Mrs. Sechrist, I'm David Baugh.

A Hi.

Q We've never met. Ma'am, when you said you were afraid somebody might come burn your trailer, you were afraid that the people who didn't like the Klan were going to come. Right?

[139] A No, sir.

Q Oh, you thought the Klan was going to come?

A Yes, sir. Anybody that can burn a cross like that, I, and have so much hatred for people, I don't, I don't put anything past them.

Q And this isn't a stupid question.

A Yes, sir.

Q It's for the purpose of the record.

A Yes, sir.

Q You're not black or Hispanic, are you?

A No, sir.

Q O. K. Now, you were there from four o'clock (4:00) until, what time did they leave?

A I don't, I have no, I don't know. We were outside and I didn't have a clock. I don't, it was late.

Q Ten (10:00), eleven o'clock (11:00) maybe?

A Yes, sir. Somewhere around there. And the . . .

Q Did you have a car out there?

A Did we have a car? No, sir.

Q How did you get there?

A Our, walking. My mother-in-law lived right [140] there near us.

Q You didn't have a telephone yet, did you?

A No, sir. They just had set it down that week.

Q Ma'am, did you ever get so fearful that you and your husband walked away?

A What do you mean – walked away?

Q Went up to your mother-in-law's house?

A Yes, sir. We . . .

Q Between four (4:00) and eleven (11:00), did you go?

A Yes, sir.

Q You left? When were you gone between four (4:00) and eleven (11:00)?

A Now, we sit on the bank right at our mother-in-law's house the whole night. We was afraid to go, we was afraid to leave after the law run them off.

Q But, ma'am, didn't your mother-in-law give them permission to do, to have this thing?

A No, sir.

Q She didn't sign a lease agreement?

A No, sir. You're talking about my husband's [141] aunt?

Q Oh, I'm sorry. Forgive me.

A Yeah.

Q All right.

A No. My mother-in-law had nothing to do with this.

Q Who is, who is your husband's aunt?

A Anna Lee Sechrist.

Q She's the owner of the property?

A Yes, sir.

Q And it's your understanding that Anna Lee Sechrist gave the Klan permission to have this function on her property?

A From what I heard.

Q Is she here?

A No, sir.

Q As you sit here now, do you know if the Klan did anything out there that she didn't know about?

A No, sir. But it was told . . .

Q O. K. Now, and you say while they burned the cross, they stopped doing the screaming and stuff about black people and they started [142] singing *Amazing Grace*?

A No, sir. They didn't . . .

Q When did they sing *Amazing Grace*?

A They didn't sing. They played it on the intercom system.

Q Oh.

A It was just music.

Q All right. They played *Amazing Grace*?

A Yes, sir.

Q And let me guess, while they were burning the cross, they weren't talking any more. They were listening to the music?

A Yes, sir.

Q All right. And there was nothing threatening about *Amazing Grace*, was there?

A While the cross was burning, I felt it was.

Q Do you think *Amazing Grace* is scary when . . .

A No, sir.

Q O. K.

A It's the most beautiful song.

Q Yes indeed. Did you see the police out on the street, on the road?

[143] A Well, it was dark and you couldn't tell, the dark, you couldn't see who was on the street.

Q Did you go complain to the police?

A Yes, sir.

Q All right. You saw their blue lights flashing?

A Yes, sir.

Q And when did you complain to the police?

A When they had pulled up around our trailer.

Q And who is they?

A Sheriff Manning and . . .

Q The question, ma'am, did you see the police out in the street an hour and a half before the cross got burned?

A No, sir.

Q I will ask you specifically if you saw a light, if you saw a car with a blue light on top of it on that road?

A No, sir.

Q Did you look out in the street to see what was out there?

A You couldn't tell what was out there. It was too dark.

[144] Q You're telling me that from your trailer to the road surface, if a police car was sitting out there with its distinctive blue lights going around, you can't see it?

A Well, at the road, the lights wasn't going around until they got pulled off to go up toward, up toward our trailer.

Q So if hypothetically someone were to come to court and say that they put their police equipment up there an hour and a half before the cross was burned and they watched and they had their safety equipment on, that's not a true statement?

A Well, now, when they, before, right before they come over, they turned them on.

Q No. The question was, if someone said that his safety equipment was on, the blue lights . . .

A Yes, sir.

Q The car was parked an hour and a half before the cross was burned . . .

A Yes, sir.

Q That would be a false, he, he, that would be a [145] false statement?

A Yes, sir.

Q That someone was sitting with those lights on?

A Yes, sir.

Q All right. Now, of course, . . .

A Not with the lights blinking, you know. They wasn't, the lights wasn't blinking on.

Q Well, could you see a car parked out on the road?

A Yeah. Yeah.

Q And could you see that the car had a light rack on top of it?

A No, sir.

Q Did anyone ever say anything threatening directed toward you?

A No, sir.

Q So it's your testimony that the hatred, we'll say for want of a better term, being exhibited made you uncomfortable?

A Yes, sir.

Q All right. And you're uncomfortable by other displays of hatred, aren't you?

[146] A Yes, sir.

Q I mean, if you seen this on television, it would have disturbed you, wouldn't it?

A Yes, sir.

Q And when you see things just men disliking other men, it makes you uncomfortable, doesn't it?

A Yes, sir.

Q Did, do you know whether or not the people who were there that night – the Klanspeople, assuming they're all Klanspeople – do you know of your own knowledge whether or not they asked Mrs. Annabell Sechrist, I'm sorry I'm messing up your last name . . .

A That's okay.

Q I know I'm not the only one (1) who's ever done it. Do you know if those Klanspeople, if they were doing anything that they hadn't asked Annabell Sechrist permission to do? Do you know that of your own knowledge?

A No, sir.

Q Based on what you saw, your subjective opinion, did you get the impression that these people [147] were intentionally trying to scare you or were they just saying things of hatred that made you scared?

A I think they were trying to scare me.

Q All right. And what did they say that made you think they were trying to scare you?

A Well, they were asking, they were asking Joey, Anna Lee's son, who we were and, and asked who our mother-in-law and father-in-law was and all about us and, I mean, if there wasn't anything to do with us, I can't see why they cared who we were.

Q So they, because they asked you that, you thought they were trying to threaten you?

A Yes, sir.

Q But they didn't, when they asked you this, they didn't make any threatening statements to you, did they?

A No, sir.

Q So, I mean, and you've been asked who you are before in your life?

A Yes, sir.

[148] Q So because you were being asked by Klansmen, you perceived that as threatening?

A Yes, sir.

Q It isn't what they said or the way they said it, it was the fact that Klansmen said it?

A Yes, sir.

Q Do you dislike anybody?

A No, sir.

Q You like everybody?

A Yes, sir.

Q Even Rush Limbaugh?

A Who?

Q Rush Limbaugh?

A I don't know who that is.

Q O. K. Pass the witness. I could tell you didn't know.

THE COURT: Any further questions?

MR. GOAD: Yes, sir. A few follow up.

RE-DIRECT EXAMINATION BY MR. GOAD:

[149] Q Anna Sechrist was the owner of the land where the meeting was on?

A Yes, sir.

Q And her son is Joey?

A Yes, sir.

Q All right. And where is your tract of land located?

A Right about, I'd say about thirty (30) foot from where theirs starts.

Q Right. And so it's adjacent to that?

A Yes, sir.

Q All right. Now, who lives on the other side of you?

A On the other side?

Q Right.

A My mother-in-law and father-in-law.

Q And is that the location that you were at?

A Yes, sir.

Q You didn't have anything to do with Anna Sechrist or Joey Sechrist?

A No, sir.

Q O. K. All right. Did you see any blue lights [150] being turned on that night?

A Yes, sir.

Q And was that before or after the deputies first came up to you?

A Before.

Q Right. And then was that when you made your report to them, when they came up?

A Yes, sir.

Q And then was that also before the cross got burned?

A No, sir. That was after the cross got burned.

Q When you made your report?

A Yes, sir.

Q What about the blue lights? Was that before the cross?

A No, sir. It was after the cross.

Q After the cross. O. K. All right. Thank you. That's all.

AND FURTHER THIS WITNESS SAID NOT.

MR. BAUGH: No further questions.

[151] THE COURT: All right. Do you plan to recall this witness?

MR. GOAD: Possibly.

THE COURT: All right. We'll ask you to wait then in the back area until you're recalled and don't discuss your testimony with anyone please.

[The witness, Rebecca Sechrist, is again excluded from the courtroom and from the hearing of any of the matters therein.]

THE COURT: Any further evidence?

MR. GOAD: No, sir. That would be our case.

THE COURT: Commonwealth rests. Members of the jury, we're going to take a recess at this time and don't discuss the evidence or anything at this point, wait until

you hear the arguments of counsel. You may now retire and make yourself comfortable and we'll take about fifteen (15) minutes.

THE JURY RETIRES TO THE JURY ROOM, OUT OF HEARING OF ANY MATTERS HELD IN THE COURT-ROOM

[152] THE COURT: All right. The jury has departed. Do I have any motions to come before the Court?

MR. BAUGH: Your Honor, we would have a motion to strike. We would reassert all our previous motions. I would tell the Court that now we see the problem with this statute and its lack of definition. The standard here is intent of a Defendant. As the Court is well aware, the intimidation cannot be based upon some sensibility of the person who feels threatened. It must be actually directed with the intent to cause them to be fearful.

All of this occurred on property where it appears there was permission. Nothing appeared to have occurred, there was no trespass. The lady said that, Mrs. Sechrist said the reason that she was upset was not because of what was said, but because of who was saying it and there's the problem. That's the problem with this statute. That sort of thing happens.

So for the reasons previously stated and the light that the government must prove, even with their inferences now, I understand there's an inference that the burning of a cross, however, that the burning of a cross is calculated to intimidated, but this lady has now given [153] us another alternative. This lady said that there were threats going on, but when it came time for the cross to be burned,

everybody got quiet and they played *Amazing Grace* and remember, the crime, going back to real basic law school, a crime occurs when all of the elements occur in the same time and space. Therefore, the threat to intimidate and the burning of the cross must occur in the same time and space and they didn't. When the cross was burning, they were playing *Amazing Grace*.

Your Honor, I would submit that the government has not met its burden of showing that the purpose of the burning of the cross was to make people in fear of bodily injury, even though not imminent, even though I've made that objection previously, that was not the purpose.

Now, Your Honor, there's a lot of discussion here about Klansmen and robes and all that – and I've got trouble with them, too – that doesn't change the standards of the law. It must be calculated to cause fear of bodily injury. Your Honor, we now have from the government's witness a different version and therefore they've lost their inference with that witness and I'd make a motion to strike.

[154] THE COURT: Gentlemen?

MR. GOAD: Judge, of course, on the motion to strike, the evidence is viewed in the light most favorable to the Commonwealth. At this stage in the case, we have presented sufficient evidence. You have the inference of the statute which is very important and then you have to look at the evidence of the case as a whole, you just can't say when this happened at one (1) time, this happened thereafter, it's all considered together.

In the case, you have the burning of the cross which is the presumption of the intent to intimidate, during leading up to the burning of the cross with the speeches, you have

specific direct language of, that we're going to take a .30/.30 and shoot the black people, which, of course, that wasn't what they said. The testimony was that they used the *N* word and that they were going to shoot them randomly. That further goes to the intent and then you have the Defendant's own words that, after he was arrested, to Investigator Clark, he said *when is the white man going to stand up to the* – should they be in here?

THE COURT: No. They shouldn't.

MR. BAUGH: No. I had a question for the [155] Sheriff. You need to step out.

MR. GOAD: And his own statements of *when is the white man going to stand up to the blacks and Mexicans in this area* and then you have the bit about the blacks and Mexicans holding hands with the white women along the sidewalks in this area.

So you have his own words. You have the presumption of the cross. You have the let's take a .30/.30 and shoot them during the rally and then also you have the size of the cross – twenty-five (25) to thirty (30) foot high. The testimony is that they could have went on to a back section of the property and where they would have not have been seen and had this rally, but, no, they had it near the public road in a flat area where the twenty-five (25) to thirty (30) foot cross – which I think is also relevant on the issue of intimidation, the height of it – so, in summary of all that together, there is sufficient evidence.

THE COURT: You may close.

MR. BAUGH: Your Honor, I couldn't let it pass – the fact that the height of the cross has something to do with the degree of intimidation. So if my client were to

[156] burn a smaller cross, it would be okay. Your Honor, the problem with this sort of statute is that it lends itself to people allowing their own prejudices to attack the prejudices of others and that's the problem with this statute. It leaves vagueness as a standard.

They have not met their burden on the statute. We move to strike.

THE COURT: All right, gentlemen. Thank you for those observations. Considering the evidence in its entirety, the Court is of the opinion that the evidence is sufficient to withstand a motion to strike. I'm going to deny your motion.

MR. BAUGH: Note my exception. We will call Sheriff Manning. I'm sorry. I just thought of it. Sheriff Manning please.

THE COURT: All right. We'll bring the jury back.

MR. BAUGH: Thank you.

THE COURT: See if they've had enough time. They may need another minute or two (2).

MR. BAUGH: Yes. We'll wait.

THE COURT: We promised them a little recess. [157] Let's take five (5) minutes of our own.

MR. BAUGH: Thank you, sir.

THE COURT STANDS IN RECESS

THE COURT: All right. Are we all back in the courtroom?

MR. BAUGH: Yes, sir.

THE COURT: Is the jury ready?

BAILIFF: Yes, sir.

THE COURT: All right. Bring the jury in.

THE JURY RETURNS TO THE COURTROOM

THE COURT: All right. You may be seated. Commonwealth's rested. Defendant have any evidence?

MR. BAUGH: Sheriff Manning please.

THE COURT: Yes. Sheriff Manning, you've been sworn. Just be seated and you remain under oath.

* * *

[158] SHERIFF H. WARREN MANNING, still being under his oath to tell the truth, the whole truth and nothing but the truth, was recalled to the stand and was examined and testified as follows:

DIRECT EXAMINATION BY MR. BAUGH:

Q Sheriff, a couple of questions. You saw my client there that night, didn't you?

A Yes, sir.

Q He was wearing the purple robe?

A I guess. I knew some kind of robe.

Q Was Mrs. Sechrist, Annabell Sechrist there?

A Yes, sir.

Q She's the property owner?

A Yes, sir.

Q She was sitting around while the cross was being burned, wasn't she?

A Yes, sir.

Q And it is her property?

A Yes, sir. Best of my, best of my knowledge.

Q And she was a participant, it would appear, in [159] the rally in which a cross was burned. Am I correct?

MR. GOAD: Objection. Speculation.

MR. BAUGH: Withdrawn. Rephrase.

THE COURT: All right.

Q Was she sitting within fifty (50), a hundred (100) feet of where this fire was burning?

A Probably.

Q Was she pointed towards what was going on?

A Yes. The best I could tell.

Q And she has trouble with her mobility, doesn't she?

A The only thing I know is she was sitting down. That's the first time I ever met her.

Q Did you ever go over and talk to her about this event because it was her property?

A No. I think she, if I'm not mistaken, she hollered at me and I think she got up, I'm not for sure, but she did say words to me.

Q And she said it was public property, private [160] property.

A Said they had permission.

Q She said the Klan had permission to do this?

A Right. She did.

Q And at that time you didn't know who the wizard was – when she made that statement? Am I correct?

A He had done came up and told me and then she started. I think that's the way it was.

Q As the owner of the property who was condoning the burning of this cross, in your estimation had she violated the law?

MR. GOAD: Objection. That's not relevant.

MR. BAUGH: It is, Your Honor. If, I mean, my, my client's intent in burning the cross is an issue, if he has permission and he doesn't think he's doing anything wrong and the owner's right there, that would certainly mitigate. We're not talking about sneaking into somebody's back yard and burning a cross.

THE COURT: Any further comment?

MR. GOAD: Judge, the fact that she may have [161] consented to the rally doesn't have anything to do with what the Defendant's intent was – which is what the issue is in this case. She hasn't been charged. We're only here with what the Defendant did. What she may or may not have done is not relevant.

MR. BAUGH: Your Honor, the statute says if you burn it yourself or you cause it to be burned and under

our statute if you aid and abet in the burning. She aided and abetted in the burning. She is an older woman. She wasn't arrested. I believe that is germane to the issue of mitigation. He gets arrested. The other person doesn't. And further, I would submit that his coming forward, I think the jury will reasonably infer the reason he came forward and offered to be arrested was because she was in trouble.

MR. GOAD: Objection. There's no evidence of that and mitigation is not for this stage either.

THE COURT: I sustain the objection.

MR. BAUGH: Note my exception.

THE COURT: Yes, sir.

Q When you got my client downtown to be booked, [162] was he still in his robes?

A No.

Q I want you to think back carefully. You do recollect him being dressed in a darker color than everybody else?

A The only thing I know is he had a robe. I'm not for sure of the colors.

Q But you're not saying he was in a white robe?

A Just, I felt like he was in some kind of robe, but the very distinct color that night, I just knew he was in a robe.

Q You're saying he was wearing a distinct color, what was the indistinct color that everybody else was wearing?

A Well, he was, all of them was, the way I seen it was white.

Q All right. And he was wearing a distinctive color?

A I think so. Yes, sir.

Q When you approached, was he sitting over in his vehicle?

A I really didn't see him when I came in because I [163] had to start talking to everybody trying to figure out who is responsible for the . . .

Q And he volunteered?

A He came up and said I am the head person.

Q Whatever.

A Yes.

Q Sir, as you're sitting here now, can you testify that the Defendant, Mr. Black, was standing around that fire when it was burned or that he lit it or that he made a speech?

A Only what he told me.

Q That's it?

A That's all I know, is what he said.

Q Pass the witness.

AND FURTHER THIS WITNESS SAID NOT.

MR. GOAD: No questions.

THE COURT: All right. You may step down.

[The witness, Sheriff H. Warren Manning, is excused from the stand.]

[164] MR. BAUGH: The defense would rest.

THE COURT: All right. Any rebuttal?

MR. GOAD: No, sir.

THE COURT: All right. Members of the jury, all the evidence is in and we will now take a recess that will be extended. Make yourself comfortable in the jury room and don't try to discuss the evidence at this time or your decision. That will come later after you've heard the closing arguments of the attorneys. You may now retire.

THE JURY RETIRES TO THE JURY ROOM, OUT OF HEARING OF ANY MATTERS HELD IN THE COURT-ROOM

THE COURT: Any additional motions?

MR. BAUGH: We would re-urge our motions previously, Your Honor, particularly, including our motion for mistrial made during the presentation of evidence and also during the chambers conference on the issues raised by the Commonwealth.

THE COURT: All right. The Court will adhere to its prior rulings and we'll go forward with the instructions. We'll take those up in chambers. Your [165] client is, of course, always welcome to come.

Let me state on the record. Mr. Black, we are now retiring to chambers to take up the instructions that will contain the law of the case and which the Court will read

to the jury. Of course, you are entitled and should be present at every stage of these proceedings. However if you waive the right, then you can no longer raise that as an issue on any subsequent appeal.

MR. BAUGH: I've explained to my client his right to be present. He's waiving it for this one (1). He may reassert his right to be present at any time and he waives it at this time, for purposes of this one (1).

THE COURT: O. K. I'll continue to invite him on each occasion then.

MR. BAUGH: Thank you, Your Honor.

THE COURT: Now, I'm going to either release the witnesses and tell them they're free to go or they can come into the courtroom.

MR. BAUGH: Yes, sir.

THE COURT: All right.

* * *

[166] IN THE COURT'S CHAMBERS – OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, and Ms. Davis.]

[While off the record, the Court accepted Instructions #1, #2, #3, #4, #5, #6, #7, and #8 which were presented by the Commonwealth without objection of the Defendant.]

MR. BAUGH: We would object to the instruction – *"The burning of the cross by itself is sufficient evidence which you may infer, from which you may infer the required intent"*.

Your Honor, we would say based upon the objections previously raised concerning our requirement, of course, of evidence and the fact that this certainly clearly states you may infer a criminal violation based solely upon the expression – and that's what this says, the expression itself is an inference of illegality and that is unlawful.

THE COURT: Isn't this in accord with the [167] statute?

MR. BAUGH: It is clearly, I will concur it's in accordance with the statute and it would certainly be dispositive of whether or not a warrant's at issue or whether or not we get to this juncture of the trial, but as to a directive to a jury. No, just because it's in the instruction, in the statute, doesn't mean that that issue goes to the jury. It is also controlling on the Court and at equal issues such as my motion to strike. To tell the jury that they may infer a crime solely from the expression, we would say, this instruction is a violation of the First Amendment.

THE COURT: Anything you'd like to say for the record?

MR. GOAD: This is taken straight out of the Model Instructions.

THE COURT: That doesn't mean that they're right.

MR. BAUGH: You're the first judge that admitted that to me.

THE COURT: It really doesn't mean they're right.

[168] MR. GOAD: And then as the Court noted, it does mirror the statute.

THE COURT: I'm going to give the instruction. It does mirror the statute and it's permissive – may infer the required intent, no presumption and so I think that that treats it as no more than an inference and it's still optional with the, with the jury and I'm going to give it over the objection of the Defendant.

MR. BAUGH: Note my exception, Your Honor.

THE COURT: Uh-huh.

MR. GOAD: Judge, there's one (1) thing I just noted, I'd forgot to look at it, but if you'll go back to the instruction on the elements of the crime . . .

MR. BAUGH: #8.

THE COURT: All right.

MR. GOAD: O. K. The very first sentence, *"The Defendant is charged with the crime of placing a burning cross in a public place"*, you don't have the phrase *"with the intent to intimidate"* and I just now remembered that. Should I add that?

THE COURT: O. K. Have you still got this on your machine?

[169] MR. GOAD: Yes, sir.

MR. BAUGH: I think we better put it in.

THE COURT: Yes. Would you . . .

MR. BAUGH: But that follows the, you did copy it out of the book exactly?

MR. GOAD: Uh-huh.

MR. BAUGH: Right?

MR. GOAD: But I left out the part about the, the *"on private property"* and just left it *"in the public place"*.

THE COURT: Carla, would you get that typed for us with that amendment?

MS. COLLINS: I'm sorry.

THE COURT: Or do you want to call?

MS. COLLINS: Sure.

MR. BAUGH: On the element instruction, after the first sentence, we need *"with the intent to intimidate"*.

MS. COLLINS: Sure.

THE COURT: O. K. We can substitute that when it comes back. Have you got any further?

MR. GOAD: Yes, sir. That's the definition of a [170] public place.

THE COURT: Any objection to that?

MR. BAUGH: No objection.

THE COURT: All right. That's #10.

MR. GOAD: Now, we go to the intent to intimidate, which I think is going to be our only real discussion.

MR. BAUGH: Kicking point. We have several. First, Your Honor, if I might, we will state that obviously intent to intimidate is an element of the offense and, as

such, I believe under the due process clause, it has to be defined for the jury.

We would propose two (2) – both based on *U.S. vs. Baker*. The first one (1) is *"The intent to intimidate means the conduct of the Defendant was calculated and intended to communicate an unequivocal, unconditional and specific threat to immediately inflict injury to the personal property of another"*. I'm assuming that because of the use of the word *immediate*, it's going to be overruled, but I'll object to it anyway. I would offer it at this time.

MR. GOAD: Which?

[171] MR. BAUGH: The first one (1) is, that one (1).

MR. GOAD: *"The term intent to intimidate means the conduct of the Defendant was calculated and intended to communicate an unequivocal, unconditional"*? O. K.

MR. BAUGH: So we'd offer that as Defendant's #A.

THE COURT: Well, we don't have objection yet.

MR. GOAD: Yes, sir.

MR. BAUGH: Oh.

THE COURT: All right. Let's hear it.

MR. McLEES: We do object to that, Your Honor, because of the use of the word *immediately* and I think the *unequivocal* and *unconditional* and specific is, is gratuitous also, but particularly because of the word *immediately*.

THE COURT: All right. I'm going to sustain the objection, deny this instruction and I'm going to mark it #11 . . .

MR. BAUGH: #11? Or do you want to do it #A or #B?

THE COURT: #A or #B?

MR. BAUGH: Whatever, whatever is your usual [172] policy.

THE COURT: Let's make this #A-1.

MR. BAUGH: All right.

THE COURT: And it was offered by the Defendant and I'm going to refuse it.

MR. BAUGH: Note my exception.

THE COURT: All right.

MR. BAUGH: As #A-2, *"The term intent to intimidate as used in these instructions means an act done with the express purpose to incite or produce again imminent lawless action by another and which is likely to incite or produce such action"*. We would offer it. I'm assuming, Your Honor, the government has the argument and I have nothing further.

THE COURT: Same argument?

MR. McLEES: That equates it with fighting words. This is, this, we object to it because the intent to intimidate is not the intent to incite others to lawless action. It's the intent to scare people by making them think they're going to be hurt.

THE COURT: I think the objection's well taken. I'm going to refuse this one (1).

[173] MR. BAUGH: The last one (1) we would offer is, it comes from Black's and it states *"Intimidate as used in the term with the intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere tempermental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic or hysteria."* and I'm trying to find one (1) that doesn't have a notation on it.

MR. McLEES: We don't, we don't have any objection to that one (1).

MR. BAUGH: I'm trying to find one (1) that doesn't have a cite on the bottom of it or some white-out.

COURT REPORTER: I can take it and recopy it.

MR. BAUGH: Thank you.

MR. McLEES: That one's clean, I think.

MR. BAUGH: Oh, good. Is that verbatim of mine?

MR. GOAD: Just in case.

MR. BAUGH: So they conceded it.

MR. GOAD: So which one (1) is this?

MR. BAUGH: I think this one's going to be, this [174] one (1) should be given, this is #A-3 and I believe it should be given after, immediately after the element instruction because intent to intimidate is an element.

THE COURT: Well, let's see then. I've got no problem with them, but the, and I don't know whether the jury pays a lot of attention to the way I number them. Instead of calling it #A-1 or #A-2, suppose I call it, whatever the element, what's the elements?

COURT REPORTER: #8.

THE COURT: Why don't I call it #8-A?

MR. BAUGH: No objection, Your Honor.

THE COURT: All right. Anything further?

MR. BAUGH: We have some punishment instructions. Do you want to do those now?

THE COURT: We'll have time to do that when the jury's out.

MR. GOAD: If I could have a moment. Then we have a verdict form. I took off the word guilty from the last case. I don't have a, I think I gave you a copy of that with that other . . .

MR. BAUGH: Yes. You did. I've got it.

MR. GOAD: O. K.

[175] THE COURT: How much time do you want to argue? Twenty (20) minutes a side? That's plenty. There's not that much to talk about.

MR. GOAD: That's true.

THE COURT: Not that much evidence. How about you?

MR. BAUGH: Was that a suggestion?

THE COURT: Uh-huh.

MR. BAUGH: Twenty (20) minutes to a side? That's fine, Your Honor.

THE COURT: Do you want me to tell you when you've used half of it or do you keep your own time?

MR. GOAD: Yeah. If you would, tell me.

THE COURT: I'll hold up my fist like that, it's half gone. If I hold it up like that, you've got two (2) minutes and I'll let you know when you have two (2) minutes.

MR. BAUGH: Thank you, sir.

THE COURT: Wait a minute. Here comes #8 redone, I hope. All right. We're ready to go. Anybody need time to get their thoughts together.

MR. GOAD: I'd like fifteen (15) minutes.

[176] THE COURT: Fifteen (15) minutes to get your thoughts together?

MR. BAUGH: I'd join in the request for some time.

THE COURT: All right.

* * *

IN THE COURTROOM – IN OPEN COURT

THE COURT: All right, gentlemen. Do you have your thoughts together?

MR. GOAD: Yes, sir.

MR. BAUGH: I wouldn't say that, but we're ready to argue, Your Honor.

THE COURT: All right. Well, let's bring in the jury.

THE JURY RETURNS TO THE COURTROOM

THE COURT: All right. You may be seated. Members of the jury, we have the instructions ready for [177] you and after I've read these instructions to you, then the attorneys will present their closing arguments.

The first thing I want to tell you about is the verdict form. At this point in the proceeding is the guilt or innocence stage. There's two (2) possible verdicts – first, *"We, the jury, find the Defendant guilty of burning of the cross in a public place with the intent to intimidate as charged in the indictment"* – if that is the jury's verdict, then the foreman should sign that portion of the verdict form. Secondly, *"We, the jury, find the Defendant not guilty"* – if that is the jury's verdict, then the foreman should sign that portion of this verdict form.

Providing this verdict form for the jury is for your convenience and in no way is this Court trying to tell you what your verdict should be.

Instruction #1. The Court instructs the jury that your verdict must be unanimous.

Instruction #2. The Court instructs the jury that the finding of the indictment by the Grand Jury against the Defendant in this case is no evidence against him and must not be permitted to influence the jury in any [178] manner in arriving at a verdict.

Instruction #3. The Court instructs the jury that the Defendant is presumed to be innocent. You should not assume the Defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the Defendant throughout the trial and is enough to require you to find the Defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the Defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

Instruction #4. The Court instructs the jury that you must not consider as evidence any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

[179] **Instruction #5.** The Court instructs the jury that you are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias and, if any have been shown, their prior inconsistent statements or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Instruction #6. The Court instructs the jury [180] that the burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged. It is not sufficient that the jury believe the Defendant's guilt probable or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction. The evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense and unless you believe that the guilt of Barry Elton Black has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find him not guilty.

The burden resting upon the Commonwealth to prove the guilt of Barry Elton Black beyond a reasonable doubt does not require that such guilt be proven beyond every imaginable, conceivable or possible doubt, but only beyond a reasonable doubt. The jury must limit its consideration to the evidence introduced and you are not [181] to go

outside the evidence to hunt up doubts nor must you entertain doubts which are speculative or conjectural. And if, upon a consideration of all the evidence, you are satisfied of the guilt of Barry Elton Black beyond a reasonable doubt, then you shall find him guilty.

Instruction #7. The Court instructs the jury that it is not necessary that each element of the offense be proved by direct evidence. For an element may also be proved by circumstantial evidence. You may convict the Defendant on circumstantial evidence alone or on circumstantial evidence combined with other evidence if you believe from all the evidence that the Defendant is not innocent beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt. The evidence as a whole must exclude every reasonable theory of innocence.

Instruction #8. The Court instructs the jury that the Defendant is charged with the crime of placing a [182] burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the Defendant burned or caused to be burned a cross in a public place; and

(2) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above

elements of the offense as charged, then you shall find the Defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the Defendant not guilty.

Instruction #8-A. The Court instructs the jury that intimidate as used in the term with the intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such [183] fear must arise from the willful conduct of the accused rather than from some mere tempermental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic or hysteria.

Instruction #9. The Court instructs the jury that the burning of a cross by itself is sufficient evidence from which you may infer the required intent.

Instruction #10. A public place is any place open to the knowledge or view of all, generally seen or known, without privacy or concealment.

That concludes the reading of the instructions. I now invite your attention to the closing arguments of the attorneys.

* * *

CLOSING ARGUMENT BY MR. GOAD:

Thank you, Judge. Thank you, ladies and gentlemen of the jury. When we began this trial, I told you that I intended to present sufficient evidence that the Defendant, Barry Black, is guilty of the crime of [184] burning a cross

in a public place with the intent to, with the intent to intimidate and I submit to you that I have done just that.

Now, as I told you when we started the case, it was going to be short. We only had three (3) witnesses. You had Sheriff Manning who went to the rally, who confront Barry Black after the cross was burned and Mr. Black admitted that he was the leader of the rally and that he was responsible for the burning of the cross.

You had Investigator Clark who place him in his police car and then brought him to the jail for processing and during that trip, he asked Mr. Clark *when is the white man going to stand up to the blacks and Mexicans in this area* and then he also stated that he had been told that blacks and Mexicans were holding hands with the white women along the sidewalks here and Mr. Clark informed well, there's no sidewalks in Cana, Virginia to which he responded he apparently had been mislead.

And then you had the testimony of Mrs. Sechrist which is very important in this case. You have a person who was actually intimidated by the actions of Mr. Black. She was a neighbor adjacent to the property where this [185] rally was held. You heard her testify that during this rally she heard people shout let's kill the black people with a .30/.30 rifle. Of course, that wasn't the word they used. They used the *N* word. Repeated racial hatred, murder and mayhem.

Ladies and gentlemen, all of that occurred during the rally that Barry Black conducted that night. As the Court just read you the instructions, there are three (3) instructions that are very important to the case. They're #8, #8-A and #9 – and you'll have these to take back to the jury deliberation room, so I won't labor them through here, but

basically we just have to show that he burned or caused to be burn a cross in a public place.

The public place is not an issue because it was visible throughout the area of where it occurred and he admitted to leading the rally, so that's a given. #1 is proven. Then, #2, and this is the whole crux of this case, that he did so with the intent to intimidate any person or groups of persons.

And #8-A is the intimidation instruction. *"Intimidation as used in the term with the intent to intimidate means the motivation to intentionally put a* [186] *person or a group of persons in fear of bodily harm"* and then it continues on.

I ask you – and consider this – what more fear of bodily harm could there be when you have speeches to let's take another human being's life. You have statements and speeches at this rally to let's kill people. There could be no higher threat of bodily harm than that. So that has been shown, ladies and gentlemen.

And, further, you have Instruction #9, the *"the burning of a cross by itself is sufficient evidence from which you may infer the required intent"*.

Ladies and gentlemen, if you feel that he did not have the intent to intimidate any, to intimidate any person or groups of persons, then go ahead and find Mr. Black guilty [sic], but I submit to you that that was exactly what he intended to do that night. If he did not intend to intimidate anybody, why did he preside over this rally? If he did not intend to intimidate anybody, why did you have a twenty-five (25) to thirty (30) foot cross built on a flat area of land

when testimony showed that the owners of this land also owned an area that was behind the hill from this location and could not have been seen from the [187] public road. And why, if he did not intend to intimidate others, did you have statements encouraging murder going on at this Klan rally? And, finally, his intent is shown by his own words. His own words tell you his intent – *when is the white man going to stand up to the blacks and the Mexicans in this neighborhood*.

Ladies and gentlemen, our country has the constitutionally protected freedom of speech and everybody in this room is entitled to that and Mr. Black is, too, but what he is not entitled to is to intimidate others and that's exactly what he did that night and he's guilty as charged.

Thank you.

* * *

CLOSING ARGUMENT BY MR. BAUGH:

May it please the Court, counsel. I love this case. I love this case because it gives me an opportunity to test my principles. I recognize, based upon my knowledge, that the Ku Klux Klan is hate group and I view [188] it as a hate group and there are many groups that are hate groups and there are many groups that are perceived as hate groups, but we have a principle in our case, in our nation that no idea is so reprehensible that it cannot be discussed in the free marketplace of ideas.

The Commonwealth says that Mr. Black's alleged words about holding hands between the races is evidence of hatred and despicable. It wasn't until 1972 that it was legal in this state to have mixed marriages. That was the official position of the government. In fact, the judge on

the Supreme Court who ruled that mixed marriages were illegal is still the Supreme Court Justice in the Virginia Supreme Court.

We've made progress. He believes that, but that's his right and no one (1) has the right to tell him he can't believe that and he can't say it. Now, one (1) of the things that people hate about the Klan is the Klan seeks to muzzle who disagree with it and that's wrong. That's un-American. To muzzle people.

And the Commonwealth is advocating that we muzzle these people and muzzling people is wrong. The Commonwealth wants you to act just like the people they [189] despise. They want you to shut people up if they don't agree with you.

It's a funny thing about changing or chasing monsters. If you're very careful, you don't become one (1) yourself while you do it and while trying to defeat evil, you must be very careful you don't become evil. You must be very careful you don't make your opponents into your teachers and we use their tactics to muzzle them.

I appreciate the fact that all of you have taken this very seriously and you have. In fact, you may not realize it yet, but you're about to make the most important decision you have ever made in your lives. People go off to war and fight and die to defend the principles of our nation and today that's what you're going to do.

Now, you're serious about it and that is conceded. Your job, as jurors, is to run a check on the government – to make sure that the government in their efforts to protect us don't violate our rights or his rights. Now, Mr. Goad is telling you that this man is not like us. He's a Klansman.

He runs around in sheets. He says kill black people. He's not like us. We should [190] treat him differently because he's not like us. He's acting as though Mr. Black were an African-American and you were a Klan jury. He's not like us. We should punish him. He's different from us. We can skewer him. He's not like us.

And, by the way, we're not alike. We know that. The Klan hates African-Americans. I'm an African-American. Duh. I know what's going on here.

Did he burn a cross with intent to intimidate? It's not a question of is he hateful or does he belong to a hate group. That's not illegal. No. The issue is he did intend.

Now, I'm going to talk to you about some of the instructions, but all of them are important and just because I don't mention some, that doesn't mean they're not important and you should take them all back there and you should make sure you understand every one (1) of them, but some of them, I want to point out.

One (1), #9, *"the burning of a cross by itself is sufficient evidence from which you may infer the required intent"*, it doesn't say you have to. If the evidence as a whole does not convince you beyond a [191] reasonable doubt his purpose in doing that was to put people in fear of their safety, then he's not guilty.

Another instruction, *"it is not necessary that each element of the offense be proved by direct evidence. For an element may also be proved by circumstantial evidence."* You can look at evidence around something and determine what happened. And they can say well, you can look at the fact that he made statements about he doesn't like black people and he doesn't like Mexicans or that someone else

said we ought to shoot people using racial epithets. However, and they say that's evidence of his intent to scare people, not, not intent to just scare them, but to place them in fear of bodily injury.

"The evidence as a whole must exclude every reasonable theory of innocence." If there was a possibility, based on the evidence, that he intended to indicate he hated this, to indicate that he was vehemently and violently opposed to it or if there's a possibility that the burning of the cross was part of their ceremony, as the government said, or if it was religious, bizarre, but they stopped making their statements and they played *Amazing Grace*.

[192] Now, first, I'm not trying to tell you the Klan are a bunch of warm, fuzzy guys. I'm not. They have a hateful history in this nation. But you can't punish them for thinking it. Because if you can punish him for thinking something, you can punish me for thinking something. If you punish the Klan because they stand up and say we ought to shoot a certain group of people, every night when I talk about somebody ought to plug Rush Limbaugh, I can get arrested. I have the right to do that.

In America, we have the right to hate and we have the right to discuss it and we want people to discuss ideas like that and find out is it worthy of belief. If you believe he burned this cross or was part of this cross burning for any other purpose, if it's possible, the government must prove to him beyond a reasonable doubt that his purpose was to intimidate and if they don't prove that, you have a duty to acquit.

"The Defendant is presumed to be innocent." They say oh, well, what if, oh, how do you, how can you say he's not guilty, you know he doesn't like black people, you know he

doesn't like Mexicans, you know he [193] feels this way about this – and I'm only reading a portion – *"the Defendant is presumed to be innocent"*, down here it says, *"suspicion or probability of guilt is not enough for a conviction"*.

They must prove to you beyond a reasonable doubt that the Defendant burned this cross with the intent to people in fear of physical injury. Period. You can't speculate. That's what they have to prove. And if the evidence isn't there, you have to acquit.

Now, what is a reasonable doubt? The Court never defines what a reasonable doubt is, but I'll give you an idea – and this is my definition and it's not controlling on any of you, it is merely a suggestion. What goes on here today must be proven to you to the degree that five (5) years from now or ten (10) years from now and you hear that Judge Mink is on the Supreme Court of the United States and Mr. Goad is then Governor of the Commonwealth and you go I remember that case and I'm just as convinced today as I was then that his purpose was not to say he hated people, his purpose was not to say I disagree, his purpose was to put people in fear of being hurt and that's why he did.

[194] And the Commonwealth says oh, well, the reason he did that is he could have gone back in the bushes. He could have gotten around a little group of people and they could have had their little ritual back there. He has a right to make as many people as he wants to hear his opinion – all of us do. We don't have the right to limit him even if he is a member of a group.

"Intimidate as used with the term intent to intimidate", Instruction #8-A, *"means the motivation to intentionally put*

a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere tempermental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic or hysteria."

It's not how fearful someone was, it was what is his intent, what was his intent. Was this lady, Mrs. Sechrist, fearful? Yes. She was. Was she fearful of what they said to her? No. She was fearful of the fact they were Klansmen. And that's what she said. I wasn't fearful because they asked me who I was. I was fearful because Klansmen asked me who I was. That's not, that's [195] timidity. Period.

If these men and women and children had burned this cross on someone's yard to make that person move, yes, it would be a violation of the law. It would be a trespass. It would be an assault. It would be placing people in fear so they would move. They had permission to burn it.

People in this case say, well, let me ask you this. What if some religious group wants to have a rally and it makes members of the Jewish community or members of the Muslim community upset or fearful? I mean, when you read the history of the world, does the Inquisition ring a bell? All right? Can we stop them from having their rallies? Can we stop the church from having parades? No. Because they have a right to say what they want. This is America.

I know it bothers people when we give those freedoms and rights to ordinary people. Those of us in the government, we're better at determining who should have those rights and benefits. No. This is serious. Our nation is not a piece of dirt between California and Maine. It isn't. It's a

group of people who share a [196] common set of principles and ideals and they are contained in our Constitution. No matter where we are, as long as we believe in those ideals, we're Americans and one (1) of those ideals is that everyone has the right to free speech including him.

Now, he doesn't have the right to go out and deliberately make someone scared, to put them in fear, to assault them, to get up in their face and scream and make them feel like they're going to be hurt. He doesn't have the right to do that – and he didn't. And you have to protect it.

And I know, you're probably, no one's brought it up, but I know you're sitting there saying wait a minute, what the heck is the black lawyer doing defending the Klansman, why would he choose to do this. The Constitution and your role as citizens, it gives you certain responsibilities and duties and when you recognize what your duty is, you have no real choice. If your duty, and you have sworn an oath to God to follow the law, and if your duty says that he has not done what they say, that he did not intend, he did not mean for people to go get fearful, to be frightened, to be afraid they're going to [197] be attacked, then you have a duty to acquit him.

Now, if you believe, based on the evidence, not your conjecture, not because of what you know about the Klan, but what happened in here, if they have convinced you beyond a reasonable doubt that was his purpose, then even if you like the Klan, you have to convict him because that's your duty. You're not here to do what you want to do. You're here to do what your duty dictates.

But if they have not proven to you beyond a reasonable doubt that that was his purpose, you have a duty to acquit and it might be difficult. Some people are going to

say you were on that jury, how in the name of all that's holy could you let a Klansman go? Gee whillikers! I think you ought to shoot him. Klansmen, what, put a bullet in their head! And you're going to say because I have a duty, I have a duty to follow the law and I'm not like those other people.

It is going to be very serious. What is your role? Now, I want to tell you right now – I've told you, Mr. Goad has told you some of the facts as he recollects them. I've told you about what this lady said. We now know that he was wearing some kind of off-colored robe. [198] We don't know what the heck he did, but he did come forward and he said hey, I'll take responsibility for it, bordering on chivalry.

But the issue here, the issue we need to talk about in closing is what are his rights and what is your role. If while discussing the facts, I get something wrong, remember my recollection does not control. If his, his doesn't either, if he says it happened on Tuesday and I say it happened on Wednesday and you think it happened on Thursday, your recollection controls. Some, don't, we're not trying to trick you. Sometimes in the course of these sort of things, in advocacy, we get involved, we don't hear everything, but your role is to make sure that prejudice does not prevail.

You'll notice that everything I say that lady there is recording – everything that the Judge says gets recorded – when we go back in there, she goes with us.

You'll notice that when you go back in that room, nobody goes with you. Nobody checks. Everyone presumes that as citizens you will do that which the law requires. No one (1) goes, but you could go back there and arm wrestle, you could flip coins, you could, you could, you could base

[199] your verdict on anything you wanted to and no one (1) would know unless one (1) of you talked. You could go back there and say gosh, did you see Mr. Goad's tie, that's disgusting, we ought to acquit him. Somebody could say did you see that fat guy, we have to check. No one (1) would know.

But, you see, being a citizen means that we presume that ordinary people are capable of extraordinary acts and that includes doing what your duty requires on the jury and tolerating even the free speech of people you don't like or viewpoints you don't happen to share. The fear is not in what he says. We shouldn't fear that. The fear is in muzzling what someone thinks that we might disagree with. That's scary. That's Nazi. That's wrong. They want us to be like Klansmen. They want us to muzzle people we disagree with.

I'm not going to call upon racial issues. I'm not going to tell you that the Klan is a nice group of guys, even though some people think they are. I don't think so. I'm not going to tell you that the Klan doesn't scare me sometimes. I'm more scared of some other people than them, but they do. But I don't have a right to live [200] free of fear. If I'm scared, that's, I have to resolve it. Now, I have a right not to have somebody threaten me directly, try to get up in my face and tell me they're going to hurt me and make me think that if I don't punch him right now, something's going to happen, but I don't have the right to tell you to be quiet because I don't like what you say. That's wrong.

No. So, what I'm going to ask you to do, and, yes, one (1) other thing. Is Mrs. Sechrist scared? Yes. Is she lying to you? No. Was she fearful? Yes. Was she scared? Yes. Is that

relevant to the issue? No. The issue is not was she fearful, it is what is his intent.

The twelve (12) of you have something very hard to do because you're going to have to follow the law and doing what the law requires might not be what the majority of the people want, but you know what? I've been a trial lawyer twenty-five (25) years and I have never seen a jury cheat. Never. I have never seen a jury make things up. When people ask, you're going to go back there, the twelve (12) of you who have never, many of you have never met before, you're going to see something marvelous. For those of you who have never served on jury duty, you've [201] never met him before today, you've never met me before today, you've never thought about this issue – you're going back in that room and you're going to argue about this like it's the most important decision you've ever made in your life and that's the system working.

In the years I've been at it, I've heard people scream; I've seen, there was a case up in Roanoke not long ago where they deposed the foreman. They came out. You have a question from the jury, Mr. Foreman? I regret, Your Honor, I'm no longer the foreman. They fired me. They go back there and they argue about issues like that and that's the system working.

It's going to be hard. It's going to be hard because the Ku Klux Klan is not a likable group. Just like if he were a young man charged with rape, he wouldn't be a likable person or if he were a person charged with a drug offense, he would not be a likable person, but he's still entitled to certain rights and it's our job to protect them. This is not a choice. It's a duty. If they get up there and they try to tell you he's different from us and therefore he should be

treated differently, that's wrong. If you get the impression that they're [202] trying to appeal to your fear or to try to appeal to your desire to show your disagreement with his views – which I do vehemently, I disagree with Mr. Black and he knows it, we've discussed this – we ain't going to be buddies, we're not going to hold hands, we're not going to, you know, I'm not going to join the Klan and he's not going to join me, which is fine with me. I just feel that unless I protect him, I can't protect anybody else. If they muzzle him, they can muzzle other people. It's not that complicated.

My client is entitled to twelve (12) jurors to determine his guilt. If you go back there, twelve (12) of you, you should listen to your other jurors and you should hear what they have to say, you should ask them what do they recollect and if you agree with them, you should vote for them, with them. But if eleven (11) of them say he's guilty and you, based on your, because your oath is as an individual, if you're not convinced beyond a reasonable doubt, you can't change your vote to go along with the jury. Twelve (12) individuals, you should listen, but at the conclusion of your listening and arguing, you have not been convinced yourself, if you change your vote, you have violated your oath. Period.

[203] Some people might say well, I don't know if he's guilty or not, maybe we'll just find him guilty and we'll give him a one (1) penny fine. You've broken your oath. If it's not proven beyond a reasonable doubt, he's to be acquitted.

I started to say I feel sorry that you have to do this. I mean, you get stuck in there just because you're registered voters. You didn't do anything wrong, but you got up this

morning and say drat, I have to go to jury duty. You had no idea what you were going to get hit with. But actually I sort of envy you because you don't get a chance to prove your citizenship to yourself. We accept all the benefits this country gives us and you never get a chance to really test it. Today you get a chance to test it and I'll tell you that if you adhere to your verdict, whatever it may be, if you adhere to the principles, you will take pride in what you do here today, even if it goes against me, and all I'm asking you to do is adhere to your principles.

If they have not convinced you beyond a reasonable doubt that his purpose was to cause people to be fearful of being hurt, then you have sworn an oath to [204] God and you have a duty – whether you like him or dislike him or like his group or dislike his group – you have a duty to acquit him.

You've been very patient. Please give Mr. Goad your same attention. Thank you.

* * *

THE COURT: Mr. Commonwealth, you may close.

MR. GOAD: Thank you.

* * *

CLOSING ARGUMENT BY MR. GOAD:

You know, as this case has progressed, I've kind of like to view the case of one (1) of being receiving the facts from the Commonwealth and one (1) of the fluff from the defense. You heard arguments previously that we're out to get Mr. Black because he's a member of the Klan and that's not right, punish him. That's not accurate, ladies

and gentlemen. He's a member of the Klan and he has every right to be a member of the Klan and he has every [205] right to believe in what he wants to believe in and that's his constitutional right – the freedom of speech is here in Carroll County, Virginia; it's in Johnson County, Wyoming; it's in California; it's wherever; but what is different – and that's what we're getting here – is that nobody, nobody has the right to intimidate others. To stretch the freedom of speech to saying you've got the freedom to intimidate others is not right.

Now, think about that. You know, one (1) of your instructions said use your common sense. Well, let's do that. Do you think that when George Washington and Thomas Jefferson and all those guys was forming our Constitution, you know, we're talking about freedom of speech and all that, do you think, put yourself in that situation, do you think at any time during the making of our laws and the freedom of speech issue . . .

MR. BAUGH: Objection, Your Honor. You ruled we were not allowed to argue on the validity of the statute or the First Amendment and that's what I'm hearing and you said I couldn't do it.

[206] THE COURT: I agree.

MR. GOAD: He argued freedom of speech and I'm just bringing up the same issue.

THE COURT: I think you're going a step beyond that. I sustain the objection.

MR. BAUGH: Thank you.

MR. GOAD: Yes, sir.

MR. GOAD: Folks, this is not a freedom of speech case. This is one (1) about intimidation. As I've previously said, nobody has the right to intimidate others and as I mentioned a moment ago, let's use our common senses – and these are the main questions I want you to consider.

If he did not intent to intimidate somebody, why is he leading a Klan rally with a twenty-five (25) to thirty (30) foot tall cross in a public place? Now, these are the facts that we have to present them – yes, he's a member of the Klan, but, no, we're not saying that just because he's a member of the Klan, punish him. We want him punished and found guilty because of the threat of intimidation. Those other facts are part of the case, but [207] it's the intimidation that's what makes this different.

If he did not intent [sic] to intimidate anybody, why are we hearing comments at the rally of well, let's use a .30/.30 rifle and kill the black people while they use the *N* word. As I mentioned before, the threat of bodily harm can never ever be more serious than the threat of murder.

And finally what was his intent is shown to us by his own words. You know, as Mr. Baugh said to you earlier, what he says and what I say is not the evidence – what the evidence is, is what came from the witness stand and from the witness stand, you heard the statements of Barry Black when he said *when is the white man going to stand up to the blacks and Mexicans in this neighborhood, the blacks and Mexicans are holding the hands of the white women on the sidewalks in Cana, Virginia* when there is none. That's what he said. That is evidence.

Ladies and gentlemen, this was a ceremony and this was a ceremony of intimidation and he's guilty as charged. Thank you.

* * *

[208] THE COURT: All right, gentlemen. Thank you for those observations. Members of the jury, the first thing you should do when you retire is to select your foreman and then after you've deliberated, then use the verdict form that I have furnished to, to indicate what your verdict is and the foreman should sign the verdict form in the appropriate blank. You may now retire and if you would knock on the door when you finish deliberating, we'll let you return your verdict in open court.

All right. You may retire and we'll send the instructions and the verdict form in to you along with the exhibits. Any objection to the exhibits going in?

MR. BAUGH: No objection to the exhibits, Your Honor.

THE COURT: All right. We will send the exhibits in with the, with the jury.

THE JURY RETIRES TO THE JURY ROOM TO BEGIN THEIR DELIBERATIONS ON THE GUILT PHASE AT 3:58 PM

THE COURT: The jury has now retired. We'll recess as far as open court is concerned. We'll retire to [209] chambers and talk about additional instructions in case we need them. All right?

MR. GOAD: Yes, sir.

THE COURT: And you're, here again, for the record, Mr. Black, you're welcome to come back to chambers to discuss the potential instructions that may be needed if the verdict is guilty.

* * *

IN THE COURT'S CHAMBERS – OUT OF THE PRESENCE OF THE JURY

[Present are the Court, the Clerk, the Court Reporter, Mr. Goad, Ms. Collins, Mr. McLees, Mr. Hurd, Mr. Baugh, and Ms. Davis.]

THE COURT: With regard to the other instructions, I don't believe I put this on the record, the only objection really to any of the instructions was to #8-A, no, #8-A was not, that was just your third choice because I refused #A and #B . . .

COURT REPORTER: #A-1 and #A-2, you refused.

[210] THE COURT: #A-1?

COURT REPORTER: And #A-2.

THE COURT: Is that the way I did them?

COURT REPORTER: Yes.

THE COURT: All right. I had refused those. Were there any other objections to the first ones?

MR. BAUGH: I objected to the inference, to the inference instruction and you said it tracked the statute and that was permissible.

THE COURT: Right. That's the only one (1).

MR. BAUGH: And I took exception to your ruling.

THE COURT: I just wanted to have that on the record because for a minute, we didn't have the record on.

MR. BAUGH: Yes.

THE COURT: All right. What do we have with regard to the penalty stage if we have to go there?

MR. GOAD: The *"You've found the Defendant guilty and don't concern yourself with anything thereafter"*.

MR. BAUGH: No objection.

THE COURT: O. K.

COURT REPORTER: #11?

[211] THE COURT: Yes.

MR. GOAD: That will be which one (1)?

THE COURT: #11.

MR. GOAD: And the punishment ranges.

MR. BAUGH: No objection.

THE COURT: All right. #12.

MR. GOAD: And the punishment verdict form.

THE COURT: All right.

MR. BAUGH: No objection.

THE COURT: All right. I'll explain that first as usual. All right. Now, do you have any instructions?

MR. BAUGH: No, sir.

THE COURT: All right. Let's talk about the convictions that go, that we discussed in pre-trial this morning.

MR. GOAD: Yes.

THE COURT: And have you resolved what you were . . .

MR. GOAD: We really hadn't had a chance to address it, the prior convictions.

MR. BAUGH: Oh, we have not. I would make a suggestion that we, we can give them a list, you can draw [212] up a list of the, in this year, he was convicted of this; this year, he was convicted of this; this year, he's convicted of this. We can either recite it to them or you can recite it to them and I'll make no objection and that will be that.

MR. GOAD: What about letting them have the notices?

MR. BAUGH: Hmm.

MR. GOAD: I filed one (1) on one (1) date and then I realized that I hadn't put enough, are we on the record or off?

COURT REPORTER: You're on.

MR. GOAD: O. K.

THE COURT: Do you need to be on now?

MR. BAUGH: I think we need to be on.

MR. GOAD: All right. And then I realized there was one (1) conviction for like, it's phrased adultery and bastardy.

MR. BAUGH: That's a good one (1).

MR. GOAD: All right. And I had to get more information on that – like I had part of it and I needed to get some of it and so the next day, I got the rest of [213] it and filed an amended notice and added that additional information and on one (1) of the convictions, on the first one (1), I said he plead guilty. He actually plead nolo and so I correct that and I think those are the only amendments.

MR. BAUGH: I don't have a nolo on here.

MR. GOAD: It should be on the amended.

MR. BAUGH: Oh, I'm sorry.

MR. GOAD: And both of them were filed, you know, within the fourteen (14) day requirement. Or we could just do a list of those convictions.

MR. BAUGH: I would submit we just do a list and you can publish it and I'll say that's it.

THE COURT: Why don't you go get your secretary to do it?

MR. GOAD: Sounds good.

MR. BAUGH: So you're going to read it. Right?

MR. GOAD: We'll then introduce it as an exhibit.

MR. BAUGH: Do you want to introduce it as an exhibit?

MR. GOAD: Yes.

[214] MR. BAUGH: All right. You want to make a list and introduce it, no objection.

THE COURT: All right.

MR. BAUGH: I mean, I think the Court actually can take, under full faith and credit, you can take judicial notice that he was convicted of this, this, this and this and we don't even have to have any paper if you don't want to, but if you want it, that's fine.

MR. GOAD: Yeah. I'd like for them to have an exhibit to take back with them that shows them listed out.

MR. BAUGH: Oh. Your Honor, I don't think that list should go back.

MR. GOAD: Well, the convictions do.

MR. BAUGH: The convictions? Now, I've never had a conviction go back. We tell the jury what his record is and that's it. Their recollection controls. If there's authority that says it has to be in writing and it has to be tendered as an exhibit, I'm not mindful of that authority.

THE COURT: Do you have any authority? We've just never had the issue before.

MR. GOAD: I'd have to look at the statute, but [215] we've always introduced the certified copies because we had to prove the conviction.

THE COURT: What's your Code Section?

MR. GOAD: It's § 19.2-295.1.

MR. BAUGH: Right. I want you to know we have reasonable explanations for all of these convictions.

MR. GOAD: Even the adultery and bastardy?

MR. McLEES: Yeah. We want to hear about that one (1).

MR. GOAD: It was referred to at one (1) point as fornication and bastardy.

THE COURT: I don't know that the Code section helps a whole lot. It just says *"At such proceeding, the Commonwealth shall present the evidence of the Defendant's prior criminal convictions by certified, attested or exemplified copies of the record of conviction"*. Then we'll go down to the, later in the statute, then it just says *"After the Commonwealth has introduced such evidence of prior convictions or if no such evidence is introduced, the Defendant may introduce relevant admissible evidence related to punishment"*.

So it really doesn't say whether, whether the [216] exhibit goes back or not. It just says you have the right to introduce the convictions.

MR. GOAD: So it says introduce, I heard the words introduce and present certified copies. Doesn't that entail that it's going to be an exhibit?

THE COURT: Well, I don't know. You've got to have those things in order to, to tell the jury at all.

MR. GOAD: Right.

THE COURT: And you've got to give your notice which I didn't bother to read. *"At such proceeding, the Commonwealth shall present"* . . .

MR. BAUGH: I'm going to amend my request, Your Honor. If the Commonwealth is willing to give us a

printed list of the offenses of which he has been convicted and the dates of conviction, we can send it back.

THE COURT: All right. If it suits you.

MR. GOAD: All right. You want to read those and see if they're . . .

MR. BAUGH: Well, I . . .

MR. GOAD: I'll amend (A) and (B) to say this.

MR. BAUGH: I thought you were just going to do [217] a list of he was convicted of this offense on this date and this offense on this date, this offense on this date and it's going to be like six (6) or seven (7) lines and that's it.

MR. GOAD: So you don't want me to put *"Order of the Court of Common Pleas of County of Greene, Pennsylvania"*?

MR. BAUGH: Do you know what that means? I don't know what that means. It sounds rather base though and common.

MR. GOAD: I could say the Defendant was convicted in the, in that court on June 5th, 1970, for a prison breech?

MR. BAUGH: I would, I would suggest that we just put this date, this offense. The Defendant, the Defendant has previously been convicted of this date, this offense; this date, this offense; this date, this offense; this date, this offense. If you want to put in Common Pleas of Pennsylvania, go ahead, I don't care. I don't even know what that is.

MR. GOAD: O. K.

MR. BAUGH: So far be it for me to base a [218] decision on ignorance.

MR. GOAD: So should I go back to my office and fix this up?

THE COURT: Uh-huh.

MR. BAUGH: If you don't mind.

THE COURT: Why don't you do that? Before you go, because this is going to take a minute, everybody agree that the Commonwealth has a right to open and close?

MR. BAUGH: Oh, yes. No. No. Wait a minute. That statute doesn't say that. No. That's been a while since we had that one (1). I believe, we ought to check that statute, I believe they have the right, I get the last word on this one (1). I think it says they get to open and close.

THE COURT: Let's see what it says. Get the Rules, let's see what the . . .

MR. BAUGH: Let's see what it says. It's been a while. It's always nice to look at the book.

THE COURT: I just want to know. Let's just go off the record while we find this.

MR. BAUGH: Shall we go off? No objection.

[219] OFF THE RECORD

* * *

IN THE COURTROOM – IN OPEN COURT

THE COURT: All right. The jury has knocked on the door. Everyone's present. We'll bring the jury in.

THE JURY RETURNS TO THE COURTROOM AFTER INDICATING THAT THEY HAVE FINISHED THEIR DELIBERATIONS AT 4:25 PM

THE COURT: All right. You may be seated. The jury has returned. Mr. Martin, apparently you have the jury's verdict. Are you the foreman of the jury?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: Has the jury reached its verdict?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: Would you present that then to the Clerk for us please? We'll let the Clerk read the verdict.

All right. Would you read the verdict please?

[220] THE CLERK: We, the jury, find the Defendant guilty of burning a cross in a public place with the intent to intimidate as charged in the indictment, signed Dannie Martin, Foreman.

THE COURT: Mr. Martin, is that the jury's verdict?

JURY FOREMAN MARTIN: Yes, sir. It is.

THE COURT: And, members of the jury, so say you all?

(The entire jury indicates an affirmative response.)

THE COURT: All of you agree with the verdict?

(The entire jury indicates an affirmative response.)

THE COURT: All right. We're going to ask you to retire for another few minutes and we will then enter the penalty stage of these proceedings and so while you're, while you're in recess, don't discuss what the penalty should be until you've heard the additional evidence and the arguments of the attorneys. You may now retire and we should be with you in about five (5) minutes.

[221] THE JURY RETIRES TO THE JURY ROOM, OUT OF HEARING OF ANY MATTERS HELD IN THE COURTROOM

THE COURT: Did you get the stipulation ready?

MR. GOAD: I'm about halfway done.

THE COURT: All right. Would you go finish that? And then let me know when you have it ready and we'll bring in the jury. Mr. Goad, the procedure with regard to who opens and closes was as I previously announced.

MR. BAUGH: You get to open and close.

THE COURT: All right. Let me know when they come back.

THE COURT STANDS IN RECESS

THE COURT: All right. Let's bring in the jury.

THE JURY RETURNS TO THE COURTROOM AT 4:55 PM

THE COURT: All right. You may be seated. Members of the jury, first let me apologize for the time [222] we took bringing you back to the courtroom. However, we were getting together a stipulation and ultimately, I

think it will save, save time with regard to the presentation of the balance of the case.

At this point, I want to again explain to you a verdict form. The verdict form that you will take to the jury room with you this time is *"We, the jury, having found the Defendant guilty of burning a cross in a public place with the intent to intimidate, fix his punishment at"* and we have several blanks or three (3) lines basically where you can fix the punishment. After you've arrived at the punishment that the jury has fixed, then the foreman should fill in this verdict form and sign the form.

Instruction #11. The Court instructs the jury that you have found the Defendant guilty of burning a cross in a public place with the intent to intimidate. You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Instruction #12. The Court instructs the jury [223] that you have found the Defendant guilty of the felony of placing a burning cross in a public place with the intent to intimidate. Upon consideration of all the evidence you have heard, you shall fix the Defendant's punishment at: (1) a specific term of imprisonment but not less than one (1) year nor more than five (5) years; or (2) confinement in jail for a specific time, but not more than twelve (12) months; or (3) a fine of a specific amount, but not more than two thousand five hundred dollars ($2,500.00); or (4) confinement in jail for a specific time, but not more than twelve (12) months and a fine of a specific amount, but not more than two thousand five hundred dollars ($2,500.00).

I now invite your attention to the closing arguments of the attorneys, opening statement of the attorneys. Excuse me.

MR. GOAD: To begin, I would have the exhibit.

THE COURT: You know, actually, I guess you should have, before I read the instructions, do you wish to present an opening statement before you present the evidence?

MR. GOAD: Yes. I would.

[224] THE COURT: All right. Then why don't you go ahead and do that and then we will . . .

MR. GOAD: Then after the opening statement, then we'll present the exhibit.

THE COURT: Well, each of you have the right to make the opening statement.

MR. GOAD: Yes.

THE COURT: All right. You may proceed.

* * *

OPENING STATEMENT BY MR. GOAD:

Ladies and gentlemen of the jury, you've now found the Defendant guilty of burning a cross with the intent to intimidate and, as you heard the Judge say, now the punishment is a range of one (1) year to five (5) months in the penitentiary or up to twelve (12) months in jail or a fine of two thousand five hundred dollars ($2,500.00), either or both. If you recall earlier this morning, we said you could punish the Defendant for as little as a dollar

($1.00) or as high as five (5) years in [225] the state penitentiary.

I submit to you that in consideration of his prior criminal history that we will be introducing that the Defendant should be incarcerated for the offense that he's committed.

And also in consideration of the punishment, you must remember the seriousness of the event that happened here on August 22nd, 1998. At that Klan rally, you had serious threats – you had serious threats of killing people and that, with all the other statements that he made, and his prior criminal history warrants his incarceration.

Now, I'm not going to suggest to you a specific amount of incarceration. I'm going to leave that to you in your best judgment, but his prior criminal history and what happened there that night warrants incarceration.

Thank you.

* * *

THE COURT: Do you wish to open?

MR. BAUGH: I do, Your Honor.

[226] THE COURT: All right.

* * *

CLOSING ARGUMENT BY MR. BLACK [sic]:

A cross burning is not new. It has been used in the past to scare people. The legislature has decided that for the worst cross burning imaginable the maximum is five (5) years in prison, which is a significant period of time, by

the way. The worst cross burning imaginable would probably entail people going up in the dead of night, sneaking into someone's yard. burning a cross, standing around, scaring people, forcing people to move, threatening their family, making people surrender the privacy of their home and run. That's the worst case scenario and that's five (5) years.

In this case, we don't have the proximity. We don't have people going onto someone else's property without permission. We don't have it directed at an individual or a family. According to the government's response, they say that the, Mr. Black by his actions [227] intent [sic] to intimidate all African-Americans in this community, all Hispanics in this community and all whites who disagree with his racist views, close quote. This is standing in the middle of a field yelling.

And for those reasons I would say that if, if the worst case scenario is as I described to you – going into someone's yard, placing them in fear, night riders, scaring people, making them flee – if that's the worst case scenario, this is not it.

Is it wrong? You've brought in a verdict and I accept that. You said it is. You said he committed a crime. But you've also said you'll consider the full range of punishment and the Congress has set, the legislature set a one dollar ($1.00) fine to five (5) years. If that's the, if that's the maximum, if that's the worst, then I would submit this is far from the worst and I would ask you to assess a fine. Thank you.

* * *

THE COURT: All right. Commonwealth, do you have evidence that you would like to present at this time?

[228] MR. GOAD: Yes, sir. I have a stipulation of the parties I'd like to introduce as an exhibit and also read.

THE COURT: You may proceed to read the stipulation.

MR. GOAD: The parties stipulate that the Defendant had previously been convicted of the following criminal offenses:

(1) In the Court of Common Pleas of the County of Greene, Pennsylvania, on May 25th, 1970, the Defendant was convicted of felony prison breech.

(2) In the Court of Common Pleas of the County of Greene, Pennsylvania, on June 5th, 1970, the Defendant was convicted of adultery and bastardy. This offense was also referred to as fornication and bastardy.

(3) In the Court of Common Pleas of the County of Greene, Pennsylvania, on July 24, 1971, the Defendant was convicted of felony burglary.

(4) In the Court of Common Pleas of the County of Greene, Pennsylvania, on July 24, 1971, the Defendant was convicted of felony larceny.

(5) In the Court of Common Pleas of the County [229] of Greene, Pennsylvania, on June 28, 1979, the Defendant was convicted of felony burglary.

(6) In the Court of Common Pleas of the County of Greene, Pennsylvania, on June 28, 1979, the Defendant was convicted of criminal escape.

(7) In the Court of Common Pleas of the County of Greene, Pennsylvania, on July 26, 1968, the Defendant was convicted of felony larceny.

And then I would have the exhibit.

THE COURT: All right.

MR. BAUGH: Based upon the documents tendered, Your Honor, we would so stipulate.

THE COURT: Very well. Thank you. We will mark that as Commonwealth's Exhibit #5.

COMMONWEALTH'S EXHIBIT #5, the written stipulation of the parties of the Defendant Barry Elton Black's prior criminal record, is received and filed as a part of the Court record in this case.

THE COURT: Any further evidence with regard, on behalf of the Commonwealth?

[230] MR. GOAD: No further evidence.

THE COURT: All right. Any evidence on behalf of the Defendant?

MR. BAUGH: No evidence on behalf of the Defendant, Your Honor.

THE COURT: All right, gentlemen. We're ready then to hear the closing arguments. You may proceed.

* * *

CLOSING ARGUMENT BY MR. GOAD:

Ladies and gentlemen, as I stated a moment ago, we'll be brief. In consideration of his prior criminal history that you have now heard – seven (7) prior convictions, one (1) of

which was a criminal escape, another one (1) a felony prison breech and all the others ones that are listed out in the exhibit – that makes the punishment more severe for this case.

And then, as I argued before, you must consider the circumstances of what happened that night. This was the burning of the cross with the intent to intimidate and [231] with serious intimidation that night. I mentioned previously about what was spoken in the rally of kill the Negroes with a .30/.30 rifle. Well, let's not forget what the Defendant himself said. The Defendant himself said *when is the white man going to stand up to the blacks and the Mexicans in this neighborhood* and all of the other racial hatred that was spoke at the meeting there that night.

That is an appropriate consideration for punishment. Now, this wasn't a low intimidation in my viewpoint. I submit that it's serious because you have intimidation of the most serious nature of murder and in consideration of that and his prior history, I ask you to impose incarceration.

Thank you.

* * *

THE COURT: Mr. Baugh?

* * *

[232] CLOSING ARGUMENT BY MR. BAUGH:

The Commonwealth is asking you to punish this man for the words spoken by someone else and they just did that. They're asking you to punish him because he's a Klansman and that's not right. They just said that you should punish him because someone else got up and said

people ought to die. I'm not surprised the Klan says that, but no one (1) says he said it and it is wrong to convict people based on association. The only thing I'm asking you to do is to base it on what he said and did. Period.

The Commonwealth has argued well, if he's a member of an organization and that organization gets up and says something, he's accountable for it. That is not true. His statements and no one (1) heard a threat come out of his mouth and for that reason, I would submit, this is not the worst case.

Is racial animus bad? Yes. It's bad. And I'm not trying to say it's not. Is the Klan bad? In my estimation, yes, but that's not what he's been convicted of. He's been convicted of his personal intent and his [233] personal actions and I would ask that you not rise to the bait given you by the government to prosecute him because of his membership in an organization even if the organization is bad and even if he is a member of it and even though he may have advocated possibly, I don't know. It's pure speculation.

He can only be convicted and prosecuted for his actions alone. Thank you.

* * *

THE COURT: Any further comment from the Commonwealth?

MR. GOAD: Just briefly, Judge.

* * *

CLOSING ARGUMENT BY MR. GOAD:

Of course, let's not forget that Mr. Black was the one (1) responsible for this rally and took responsibility for the

burning of the cross and all that [234] along went with it, with everything that was carried about that evening and then let's talk about what his statements were. As I mentioned to you before, he himself made this statement about *when is the white man going to stand up to the blacks and the Mexicans in this neighborhood* and everything else that he said that night and he should be held accountable for that.

Thank you.

* * *

THE COURT: All right, gentlemen. Thank you for those observations. Members of the jury, I told you about your verdict form and I've read the instructions to you. You may now retire and when you've arrived at the verdict, the foreman should fill in the verdict form, sign it and let us know when you finish. You may now retire.

THE JURY RETIRES TO THE JURY ROOM TO BEGIN THEIR DELIBERATIONS ON THE SENTENCING PHASE AT 5:08 PM

THE COURT: All right. If you don't go too far, [235] we'll try to let you know when the jury returns. We'll stand in recess while they're deliberating.

THE COURT STANDS IN RECESS AWAITING THE JURY'S VERDICT

* * *

IN THE COURTROOM – IN OPEN COURT

THE COURT: All right. Bring in the jury.

THE JURY RETURNS TO THE COURTROOM AFTER INDICATING THAT THEY HAVE FINISHED THEIR DELIBERATIONS AT 5:52 PM

THE COURT: All right. You may be seated. The jury has returned. Mr. Martin, as foreman of the jury, has the jury arrived at its verdict?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: All right. Madame Clerk, would you read the verdict for us please?

THE CLERK: We, the jury, having found the Defendant guilty of burning a cross in a public place with [236] the intent to intimidate, fix his punishment at two thousand five hundred dollar ($2,500.00) fine, signed Dannie Martin, Foreman.

THE COURT: Mr. Martin, is that the jury's verdict?

JURY FOREMAN MARTIN: Yes, sir.

THE COURT: Members of the jury, so say you all?

(The entire jury indicates an affirmative response.)

THE COURT: All right. Any motions while the jury's here?

MR. BAUGH: None from the defense, Your Honor.

THE COURT: All right. Members of the jury, thank you for your attendance. Someone, I believe the bailiff indicated that it was your desire not to be photographed and

you did not wish to make any statements to the press. Is that your desire?

(The entire jury indicates an affirmative response.)

THE COURT: All right. In that case, I'm going to let, we have some things we need to do to wrap up the case. We thank you for your attendance and we'll let you [237] depart by the back way and, members of the press, I direct that they not be photographed or any effort be made to interview the jury as per their request.

Members of the jury, you may now depart.

THE JURY LEAVES THE COURTHOUSE

THE COURT: All right. The jury has now departed. Any motions on behalf of the Defendant?

MR. BAUGH: Your Honor, we would make the motion to set aside the verdict as contrary to law and evidence. We would additionally re-urge our previous motions and objections made in pre-trial and trial specifically and most importantly our First Amendment issues.

THE COURT: All right. We hashed and re-hashed those.

MR. BAUGH: Yes, sir.

THE COURT: And the Court will deny the motions as I've previously ruled and adhere to its prior rulings.

MR. BAUGH: Then at this time, Your Honor, we'll, well, we'll just leave. We'll think about appeal later.

[238] THE COURT: Well, let me, let me say some things. Of course, this is a felony conviction.

MR. BAUGH: Yes, sir.

THE COURT: Has, even though there's no jail, he does have the right for a pre-sentence report. Do you waive that?

MR. BAUGH: Yes, Your Honor.

THE COURT: All right. Commonwealth waive its right to have a pre-sentence?

MR. GOAD: Yes.

THE COURT: All right. Let me advise Mr. Black that you do have the right to appeal and, of course, the verdict will go down today against you, so you'll have thirty (30) days to note your appeal. Failure to note that appeal within the thirty (30) days is jurisdictional. So if it's not done, you don't make up your mind, you lose your right to appeal.

MR. BLACK: Yes, sir.

THE COURT: Of course, you're being represented by counsel at this point, but you do understand that if you're indigent and you don't have the funds with which to perfect your appeal, if you qualify as an indigent, the [239] Court will consider that request for a court-appointed counsel to assist you in the appeal. If that occurs, if you do qualify, the attorney will be appointed; the transcript will be typed without initial expense to you and that will be made available. If you prevail, of course, you pay no costs. If you don't prevail on the appeal, the cost of the attorney will be added as court costs and the cost of typing the transcript will be added.

Do you have any questions about things I've now told you?

MR. BLACK: No, Your Honor, just is . . .

MR. BAUGH: Your Honor, I have advised Mr. Black that until such time as he makes his decision, I am his counsel. I will advise him of constitutional rights including his right to appeal.

THE COURT: All right. Thank you very much. Then let me, does he have the money to pay his fine today?

MR. BAUGH: No. He does not, Your Honor.

MR. BLACK: I have some money, Your Honor.

MR. BAUGH: Your Honor, I would ask the Court to suspend the imposition of the fine until such time as, if we do give notice of appeal, until such time as those [240] issues are resolved.

THE COURT: I'll receive that as a motion to stay the execution pending the . . .

MR. BAUGH: Please, Your Honor.

THE COURT: That decision. Any objection to an initial stay of thirty (30) days pending the filing of the notice of appeal?

MR. GOAD: No, sir.

THE COURT: That motion is granted and thereafter as long as he is actively involved in the appeal, in the appellate process, then it will be stayed pending that appeal.

MR. BAUGH: We'd also ask the same for costs.

THE COURT: Yes.

MR. BAUGH: Thank you.

THE COURT: All right. Let the record show that throughout the proceedings on all points relevant unless the accused waived his right to be present, that the Defendant and his attorney were both present throughout the entire proceedings.

MR. BAUGH: So stipulated, Your Honor.

THE COURT: Thank you very much. You will have [241] to, well, until, and I've just imposed sentence. In Virginia, once a person is convicted of a felony, you must submit to a DNA test being made, a blood sample being withdrawn for the purpose of a DNA test. The test that we have will be available on July 20th at nine (9:00) AM at the Health Department here in the first floor of F1 Building C, what is it, first floor, Building C of this building. So if you, can you report back here at nine (9:00) AM on July 20th?

MR. BAUGH: Either he'll report, Your Honor, or we'll make arrangements with the Sheriff's Office to have him submit a sample in the jurisdiction where he lives or something, if it's available.

THE COURT: There's one (1) other alternative. In lieu of, of going to the Health Department, he can go to our Regional Jail . . .

MR. BAUGH: Today?

THE COURT: Which is in Dublin. Well, I don't think they'll do them after hours.

MR. BAUGH: Oh, that's right.

THE COURT: Can you help me with that? Do you know?

[242] BAILIFF: No, sir. I don't believe they do them after hours.

THE COURT: I don't think they do either. If he would make arrangements . . .

MR. BAUGH: Could he do it tomorrow, Your Honor?

THE COURT: O. K. At the Regional Jail?

MR. BAUGH: At the Regional Jail or the Health Department tomorrow, whichever is most convenient.

THE COURT: Well, . . .

MR. BAUGH: Oh, they only do it July 20th at the Health Department.

THE COURT: Right.

MR. BAUGH: The Regional Jail in Dublin. We'll get directions from the Sheriff's Office to get to Dublin.

THE COURT: All right. We will fax them the test, I'll sign the form, give him a copy and we'll fax it and if he'll report to the jail tomorrow to give the test then they'll take care of that.

MR. BAUGH: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. GOAD: You may have said this and I missed it. Did the Court formally receive the verdict and make a [243] finding of guilty?

THE COURT: The, no, I guess I really didn't. I did overrule his motion. So, for the record, the Court now enters up a finding of guilt in accordance with the jury verdict and imposes a fine of twenty-five hundred dollars ($2,500.00). As I indicated before, that will be stayed for the purpose of appeal.

MR. BAUGH: Thank you, Your Honor.

THE COURT: Thank you.

* * *

AND THIS MATTER WAS HEREBY CONCLUDED ON THIS DATE AND AT THIS TIME AND NO FURTHER EVIDENCE WAS TAKEN THEREIN.

* * *

[244] COMMONWEALTH OF VIRGINIA

COUNTY OF CARROLL

I, DEBBIE A. WILSON, do hereby certify that the foregoing report of the trial by jury in the case of Commonwealth of Virginia, Plaintiff, vs. Barry Elton Black, Defendant, was personally recorded by and transcribed by me and is a full, complete and accurate record of the proceedings held on the 23rd day of June, 1999, to the best of my knowledge, belief, and ability.

Given under my hand this 23rd day of August, 1999.

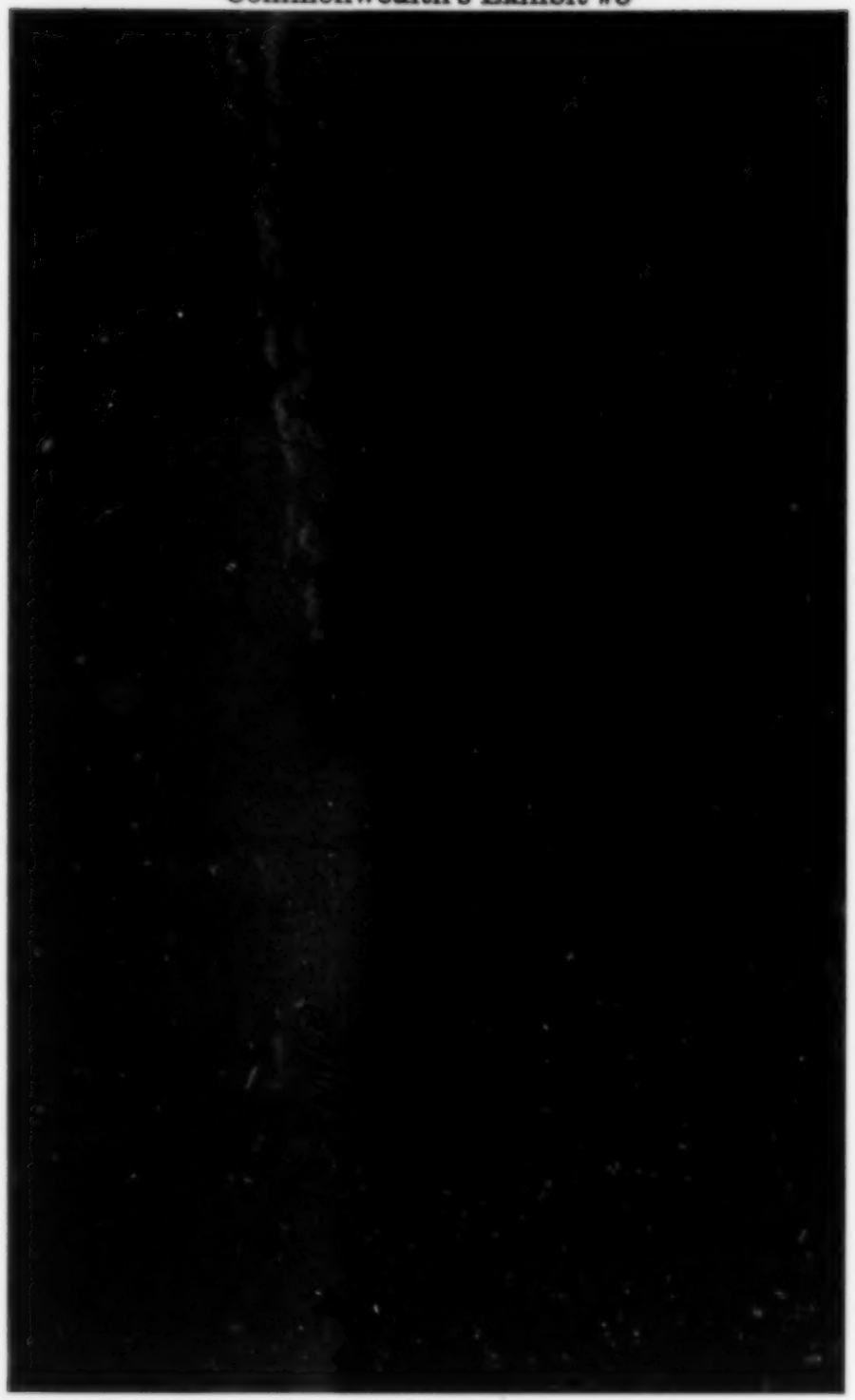
/s/ Debbie A. Wilson
DEBBIE A. WILSON
Court Reporter and
Notary Public

My commission expires April 30, 2001.

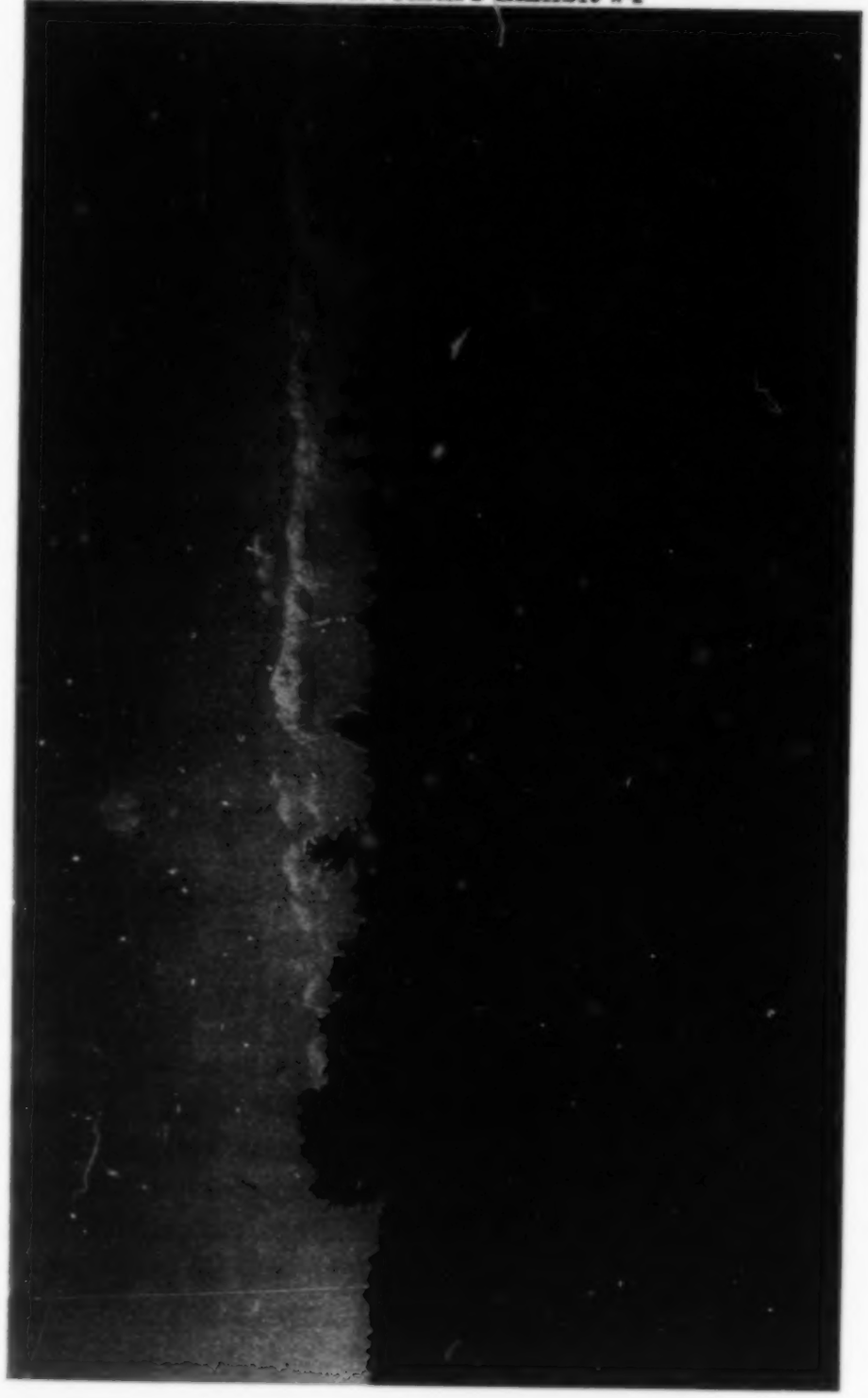
Commonwealth's Exhibit #1

Commonwealth's Exhibit #2

Commonwealth's Exhibit #3



Commonwealth's Exhibit #4



Commonwealth v. Black

INSTRUCTION NO. 3

THE COURT INSTRUCTS THE JURY THAT:

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

INSTRUCTION NO. 7

THE COURT INSTRUCTS THE JURY THAT:

It is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is not innocent beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

INSTRUCTION NO. 8

THE COURT INSTRUCTS THE JURY THAT:

The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant burned or caused to be burned a cross in a public place; and

(2) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

INSTRUCTION NO. 8-A

THE COURT INSTRUCTS THE JURY THAT:

Intimidate, as used in the term "with the intent to intimidate" means a motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria.

INSTRUCTION NO. 9

THE COURT INSTRUCTS THE JURY THAT:

The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent.

INSTRUCTION NO. 10

THE COURT INSTRUCTS THE JURY THAT:

A "public place" is any place open to the knowledge or view of all; generally seen or known; without privacy or concealment.

VERDICT FORM

We the jury find the Defendant guilty of burning a cross in a public place with the intent to intimidate, as charged in the indictment.

/s/ Dannie Martin
FOREMAN

We the jury find the Defendant not guilty.

_____
FOREMAN

PUNISHMENT VERDICT FORM

We the jury, having found the Defendant guilty of burning a cross in a public place with the intent to intimidate, fix his punishment at $2500.00 FINE.

/s/ Dannie Martin
FOREMAN

CONVICTION AND SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT
OF CARROLL COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 035

Hearing Date: June 23, 1999
Judge: DUANE E. MINK

COMMONWEALTH OF VIRGINIA

v.

BARRY ELTON BLACK, DEFENDANT

This day came the defendant, who appeared in person with his attorney, David P. Baugh. The Commonwealth was represented by Gregory G. Goad. Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the Indictment, which plea was tended by the accused in person.

After being advised by the Court of his right to trial either by jury or by the Court and, after consultation with counsel, the accused did not waive his right to trial by jury and to which the Court approved.

The Court then impaneled twenty qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their rights to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the evidence was presented by the Commonwealth and the defendant.

At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which motion was overruled and exception was noted.

At the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence on the same grounds, which motion was overruled and exception was noted.

After hearing the evidence, the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open Court, in the following words:

Costs. The defendant shall pay costs of $4107.50. The defendant is Ordered to pay unto the Commonwealth its costs in this case pursuant to law including any Court appointed counsel fee allowed by this Court. The defendant was advised by the Court that his driver's license shall be revoked according to Virginia Code Section 46.2-395, and that he is subject to further charges as set forth in Virginia Code Section 19.2-358 for failure to pay according to the direction of the Court. The defendant shall pay according to a schedule to be filed with the Court for monthly payments which are due each month until all costs are paid in full.

And it is further Ordered that pursuant to Section 19.2-310.3 of the Code of Virginia, as amended, the defendant shall have a sample of his blood taken for analysis. The Court Orders the defendant to cooperate fully and promptly in permitting the said withdrawal of blood as

required by law. The Court Orders the defendant to report to the New River Valley Regional Jail on June 24, 1999, at 9:00 a.m., for the withdrawal of the said sample of blood in accordance with law.

Thereupon, the jury was discharged.

And counsel for the defendant moved the Court to stay the execution of the fine pending the defendant's decision regarding appeal and the perfection of said appeal if so noted, and which motion is granted. The Court further Orders a stay in the payment of costs to the Commonwealth pending the perfection of an appeal if noted.

The Court certifies that at all times the defendant was personally present with his attorney who capably represented him.

June 28, 1999 — DATE
ENTER: /s/ Duane E. Mink — JUDGE

DEFENDANT IDENTIFICATION:

Alias: none
SSN: 159-40-8378 DOB: 1/6/48 Sex: male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: $2,500.00 fine

TOTAL SENTENCE SUSPENDED: none

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 19th *day of* December, 2000.

Barry Elton Black, Appellant,

against Record No. 1581-99-3
Circuit Court No. CR 98-461

Commonwealth of Virginia, Appellee.

From the Circuit Court of Carroll County

Before Chief Judge Fitzpatrick,
Judges Coleman and Frank

For the reasons stated in *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000), we affirm the judgment of the trial court.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk
By: /s/ Marty V. P. Ring

Deputy Clerk

VIRGINIA: CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA v JONATHAN STEPHEN O'MARA, Defendant.	)	RECORD CR98-3193
COMMONWEALTH OF VIRGINIA v RICHARD J. ELLIOTT, Defendant.	)	RECORD CR98-3631

Before Hon. Alan E. Rosenblatt, Judge
Virginia Beach, Virginia
January 20, 1999

APPEARANCES: Commonwealth's Attorney's Office (Mr. Afshin Farashahi and Mr. Scott C. Vachris), attorneys for the Commonwealth.

Stallings and Richardson (Mr. Kevin E. Martingayle), attorneys for defendant O'Mara.

Zoby and Broccoletti (Mr. James O. Broccoletti), attorneys for defendant Elliott.

[2] THE COURT: All right. These are the cases of Commonwealth of Virginia versus Elliott and Commonwealth of Virginia versus O'Mara.

Is the Commonwealth ready?

MR. VACHRIS: Yes, sir.

THE COURT: Are the defendants ready?

MR. MARTINGAYLE: Yes, sir.

MR. BROCCOLETTI: Yes, sir.

THE COURT: All right. The issues of constitutionality have been submitted to the court and they have been briefed, and the matter is on today for a ruling; and since I don't know what she took down, apparently counsel doesn't desire any further oral argument; is that correct?

MR. FARASHAHI: That's correct, Judge.

MR. MARTINGAYLE: Yes, sir, that's correct.

MR. BROCCOLETTI: Yes, sir.

THE COURT: Okay. Well, I have just two questions then; and pardon me if they sound elementary, but I just want to cover all the bases here. The first one – the first question is directed towards the Commonwealth, and it's simply this. Does the Commonwealth concede that we're talking about symbolic speech here that requires a First Amendment analysis?

MR. FARASHAHI: Judge, we're not talking [3] about symbolic speech here. What we're talking about – as we argued, we're talking about conduct that is not – that is not symbolic speech. It's simply conduct that is prohibited by the statute. Your Honor, since you asked that question

if I can just say one thing I think that follows along with it.

THE COURT: Say anything you like. Make sure I understand what you're saying. Are you saying that we don't even have a First Amendment issue here?

MR. FARASHAHI: Well, Judge, we have a First Amendment issue in the sense that the court has to look at First Amendment cases; but I don't think we have a First Amendment issue and, in fact, that the statute prohibits speech if that's what you're asking.

THE COURT: Well, it's not speech. It prohibits cross burning.

MR. FARASHAHI: That's correct.

THE COURT: The question is, Is that akin to speech? Is that symbolic speech? And that's why we have a First Amendment.

MR. FARASHAHI: Judge, it can be speech under certain circumstances; and I think what I'm going to say follows along with the question that you're asking. Your Honor, the case – the only case really here is R.A.V. v. Minnesota from the supreme court in 1995. [4] That is really the major case, obviously, for the court to consider. Judge, in that case the U.S. Supreme Court struck down the statute in question – the cross-burning statute; and the court's ruling, Your Honor, was based on the fact that that – that statute prohibited conduct – the type of conduct that was designed to express, and then that was laid on the statute. That was designed to express hatred towards certain groups as the court laid it out; and, Your Honor, the Supreme Court in that case said that that was – the court was – or the statute was prohibiting speech in

the sense that it was content based. In other words, it laid out certain types of speech, certain issues and said that you cannot – you cannot prohibit – you cannot do these things if you're going to express an opinion on this topic.

Furthermore, Your Honor, in that case, the court held that the statute in question – not only was it content based, but it was also viewpoint based. In other words, the state in that case had taken a position on the – on the speech, on the viewpoint. Basically the state had taken one side and said you cannot do a certain act to express hatred towards a certain group. In other words, as the court said, it didn't prohibit acts that would actually favor those [5] groups. So it was content based and it was viewpoint based.

Your Honor, I think the main distinction of the statute of Virginia, which I don't think the defense –

THE COURT: Wait a minute, Mr. Farashahi. You've gotten a little ahead of me. Hold on a second. You're jumping ahead of me because the reason for that whole analysis in R.A.V. was that the court felt that the statute, while it regulated conduct, was regulating what we call symbolic speech.

MR. FARASHAHI: That's correct.

THE COURT: And then it went on to do an analysis on the statute, and that's fine; and I'll hear all that, but what I want to know is isn't that – that's the point we're starting with. You agree, do you not, that this is symbolic speech and it requires a First Amendment analysis? That's all I'm asking. I'm not – I'm not asking how it's going to come out.

MR. FARASHAHI: I guess I disagree with you to some extent, Judge. I think, obviously, it requires a First Amendment analysis; but I don't think the starting point is symbolic speech. I think – as you know, the court has held that threats of violence are not protected by the First Amendment. So that's not [6] symbolic speech.

THE COURT: Burning a cross is, though, isn't it?

MR. FARASHAHI: Well, again, Judge, this is akin to that, to threat of violence – to that type of speech.

THE COURT: Okay. All right. Go ahead.

MR. FARASHAHI: Maybe I'm misunderstanding what you're saying; but for example, Judge, in the Fourth Amendment context when the court analyzes an encounter between a police officer and a citizen, the court – the first question that the court asks itself is this. First of all, was this a seizure. In other words, is this something that would require to look at the Fourth Amendment law. If the court says no, it is not a seizure, that it was a consensual encounter, then we don't look at the Fourth Amendment law. So in a sense, Judge, in that case, yeah, we do do a Fourth Amendment analysis to, first of all, determine whether there was a seizure; and then if there was a seizure, then determine whether there's reasonable suspicion or probable case, whatever the circumstance may be.

Similarly, Judge, in this case I think you're right. We have – obviously, we have to look at it from a First Amendment viewpoint to a First Amendment [7] analysis; but I think the first question would be whether it's symbolic

speech and then move on to the analysis. I don't know if that answers your question.

THE COURT: Okay. I'll take that.

All right. Mr. Martingayle.

MR. MARTINGAYLE: Yes, sir.

THE COURT: Do either of you want to respond to what he said?

MR. MARTINGAYLE: I'll say very briefly, Judge, I think under the R.A.V. decision, Sheldon, Vawter – those are three decisions that I briefed in addition to all of the cases contained on Page 3 of my opening brief which give examples of conduct which equal speech. This is clearly a First Amendment analysis.

Keeping in mind that we don't get into any of the facts of this case, we have to assume realistic scenarios. For instance, the kind of activity that we know that this statute was designed to prohibit; and one of the things clearly it was designed to stop was Klan rallies. We can come right out and say that. They didn't want to have Klan rallies; and so what happens at a Klan rally is they burn a cross on somebody's property; so everybody else who's there participates in the burning, of course, is now going to [8] be guilty of a crime. That's one of the things clearly this was designed to stop.

Now, the act of burning that with permission on somebody else's property, Judge, is not likely to produce an immediate threat of harm as required by Brandenburg; and that's the sort of example that you see the courts struggle with in all the cases that have dealt with this issue.

I would finally point out – and then I'll address your question, Judge – I would finally point out that if you compare – if you take our briefs and you turn to the pages where we've actually cited the entirety of the Virginia statute compared with the Florida statute, compared with the Washington statute, compared with all of them, the Virginia one is probably the least protective of free speech. It's the only one that has no requirement of lack of permission to be on somebody else's property. So, in other words, under the Virginia statute, if you go onto somebody else's property with permission, you have violated the Virginia statute. That is not something that you'll find in any of the others, and I quoted the entire text of the Florida and Washington ones. The Commonwealth's brief only gave you the part that looked similar to Virginia, but what they left out but I included was the [9] part that talked about permission or lack thereof.

Lack of permission is one more step toward what's required by Brandenburg. Brandenburg requires that there be a threat of – and I quote – imminent lawless action – all three of those words. So first the actor must have the intent to produce such action; and, secondly, it must be likely – not possible, but likely that the words or the form of expression will produce the imminent lawless action; and that's where the Virginia statute completely falls apart.

I would note finally and then I'll sit down, Judge, that since R.A.V. was decided, there have been no amendments to the Virginia statute, nothing done to bring it into line with the requirements of R.A.V.; and I think it is clearly a content-based regulation in violation of the constitution.

THE COURT: Well, that raises a question – perhaps another question, and that's one that's sort of been hanging back there, Mr. Martingayle; and that is you start off your brief addressing Brandenburg. Is Brandenburg addressed in R.A.V.?

MR. MARTINGAYLE: Judge, I'd have to look at the body of R.A.V. again to give you a –

THE COURT: Well, R.A.V. and the cases you cited were fighting words cases. I am having a hard [10] time understanding how Brandenburg even comes into this case. It seemed to me that in R.A.V. the court laid it out pretty well as to what should and should not be considered when you review a statute of this nature, and – I don't know. Maybe it was cited in there, but I don't remember. Does anybody remember?

I mean here we're dealing with a statute which very clearly in my mind at least is directed at words, despite what the Commonwealth says, and actions that inflict injury or intend to incite immediate breach of the peace. That's right out of Chaplinsky. So it would seem to me that a fighting words analysis is what we're looking at here in this case. Do you agree or disagree with that?

MR. MARTINGAYLE: Well, what we're looking at, Your Honor, certainly Chaplinsky is part of the equation; but the Brandenburg standard is what shows the balance between hate speech or hate conduct that is also speech – expressive speech and the First Amendment. There has to be that balance, and so what Brandenburg does is tell us what factors are required in order to take the hate speech from being protected to not protected. When do we cross over that line? That's what Brandenburg is all about; and I don't think that any First Amendment analysis

on this subject is [11] complete without looking at that case, particularly given the strong language and strong things said in the Brandenburg case that were protected; and that was speech that seemed to advocate immediate action, and that was protected; but I think that the main thrust, Judge, is Brandenburg is sort of a stage-setting case from my point of view.

The problem they've got I think is R.A.V. As I pointed out, particularly in my reply brief, this statute plays favorites. It plays favorites exactly as prohibited by R.A.V., and it does so in two ways. One, it protects certain groups. It doesn't protect others, and I don't know if you've had a chance to go through the examples that I put together of things which you could do to intimidate other groups of people which would not be at all illegal. That was in my reply memorandum, Judge; and I'll take you to that. That's on – Page 9 I go through several examples that are kind of twisted things to try to make up to put into a brief; but I was trying to come up with shocking things that someone could do that are expressive conduct, obviously which would have the effect of intimidating somebody that aren't illegal; and so what we've got is certain groups – for instance the Catholics or the police officers or in one instance black people – who [12] don't get protection under this Virginia statute so it plays favorites, but it also plays favorites in the mode of expression.

For instance, you can – I gave the example of the cross burning part of it is illegal under the Virginia statute; but what about where someone does something like takes a black mannequin and desecrates that right in front of or next door to people that are black? That clearly is a mode of expression that is not illegal according to the Virginia

statute that is actually more offensive than the Virginia statute. That's playing favorites.

THE COURT: So that means that the statute's underinclusive.

MR. MARTINGAYLE: It does mean that the statute would be underinclusive in that regard as to the mode of expression. It also means that it's going to be underinclusive in terms of the groups that it protects. It can be under and overinclusive as Justice Scalia wrote.

THE COURT: This statute makes it against the law for anyone to burn a cross for any reason whatsoever –

MR. MARTINGAYLE: Yes, sir.

THE COURT: – with the intent to intimidate. [13] So how is any – it may not cover all circumstances that you can dream up of intimidation, but it clearly makes illegal any act of burning a cross with the intent to intimidate. So it covers all classes.

MR. MARTINGAYLE: The difficulty here, Judge, is that intent to intimidate alone is not enough. That's another one of the problems of the Virginia statute because that's where it falls short of what is required in Brandenburg, and that's why you have to set the stage with Brandenburg. Brandenburg requires more than just the intent to intimidate; but, in addition to that, the threat of imminent lawless action or behavior. That's something missing. They never get to the next step.

Now, what the general assembly tried to do rather innovatively but I would argue ineffectively is that they then flipped the burden. They say, Well, you have to intend to do something; and, by the way, we're going to assume

that intent; and that's the issue that was briefed by Mr. Broccoletti; but –

THE COURT: I'll get to him.

MR. MARTINGAYLE: But, Judge, I would argue that the weight of the authority out there, reading all these cases together, taking a look at the R.A.V. decision, the analysis made by the Maryland Court of [14] Appeals in Sheldon, the analysis of the New Jersey Supreme Court in Vawter, even the cases cited by the Commonwealth as their favorable authority – T.B.D. and Steven from Florida and California respectively, the Talley decision out of Washington – all of them point out things in their statutes, even the ones that uphold statutes, that are different and are strikingly important and different from the Virginia statute.

For instance, the T.B.D. decision in Florida, 1995, permissive burnings are okay under that statute even if you do intend to intimidate somebody. If it's with permission, it's okay. That's not the law in Virginia. That was the part left out of it when they cited the statutory language in T.B.D. I included it in my reply brief.

In the Steven case, California, 1994, once again under that statute, permissive burning's okay. Not so in Virginia; and, by the way, Steven tries to make it a little more evenhanded in terms of what kinds of expression by saying crosses and other religious symbols. I think they recognized the problem with playing favorites with crosses; so you could burn the Virgin Mary by the Catholics, but you can't burn a cross. That doesn't make any sense.

THE COURT: You might need another statute. [15] You need to go to Richmond and say, We need another statute banning the burning of the Virgin Mary.

MR. MARTINGAYLE: Well, that may be the case, Judge; but until there is that other statute, what we've got is a playing favorites situation, which is what R.A.V. says you can't do. Justice Scalia wrote a long opinion, and it's in many ways difficult to digest.

THE COURT: Very difficult.

MR. MARTINGAYLE: But the one part that comes out very clearly is you can't play favorites. That's what he says. That's what he writes, and those are his words. He talks about playing favorites, and the Commonwealth concedes that in the brief that you can't play favorites.

Finally, I would point to the Talley decision. Section 1 was upheld, but that requires the context from Brandenburg. Section 2 was stricken. That was the content-based part of the Washington statute that had the automatic presumption attached to it, so that's important. The Talley court in Washington also made that distinguishing analysis, and that's on Page 5 of my reply brief.

Finally, I'd point out that McDermott also cited by the Commonwealth as favorable authority, which [16] is an Eighth Circuit decision, states that cross burning may or may not be expressive conduct. You have to have the proof of the imminent threat of lawless action; and that's right out of McDermott.

So I defy the Commonwealth to come up with a case where you've got all this authority out there and this Virginia statute which has no requirement of context, no

requirement of imminent lawless action where even permissive cross burnings are illegal. I defy them to come up with an opinion that says that it's okay. It's clearly not constitutional under the weight of authority out there, and I haven't seen them cite any cases with a statute remotely like the Virginia one.

THE COURT: Do you want to respond?

MR. FARASHAHI: Judge, I'll just make three quick points. First, Your Honor, in Sheldon and Vawter and in those cases that the defense cites, first of all, Judge, they're state supreme court cases; but I think the distinction is that in those cases what they were screening against I believe in Sheldon was religious symbols, which is exactly what R.A.V. said you can't do; and also, Judge, in Vawter they talked about exposing others to threats of violence or hatred on the basis of race, color, creed or religion, which [17] is again similar to the R.A.V. case. Judge, that again goes to what R.A.V. was talking about where you can't pick a content – you can't pick a topic and say you can't express views on this topic and also you can't take the side on those topics – take the side of those issues.

Finally, Judge, if, as defense says, what's fatal to the statute here is that there is nothing in here about saying with or without permission, Judge, I think when the statute says with the intent of intimidating any person, I think maybe – I think that takes care of that – that criticism of the statute; but, Judge, I do think that R.A.V. is the case here; and the Virginia statute addresses – although, Judge, the statute was passed, it's my understanding, prior to R.A.V. coming out; but the Virginia statute addresses the two flaws in the R.A.V. statute –

that is, that it does not pick certain issues and said you can express – you can express your feelings on these issues; and also, Judge, it does not pick sides on those issues; and I think that's a very important distinction and I think that's why it complies with what the court laid out in R.A.V.

MR. MARTINGAYLE: Judge, just briefly. If you go to Page 6 of my brief – and this is from the [18] Talley decision, a case cited by the Commonwealth. It talks about near the bottom, Even if construed to address only fighting words as the Minnesota Supreme Court did with the Saint Paul ordinance, the statute is still unconstitutional under the R.A.V. analysis because even fighting words may not be regulated based on their content.

Now, we know what this statute in Virginia is doing. As I pointed out in my brief, Roger Grute, Professor at W&L, in Criminal Offenses and Defenses in Virginia, states Section 18.2-420 through 18.2-423, although not so stating, are directed at the activities of supremist groups; and is there really any doubt about that? We don't have to take it at face value that, well, there's nobody in particular in mind. We know that there are particular people in mind.

As I said, the general assembly got innovative; but I don't think it passes constitutional muster. Just because they didn't name a particular group that might be offended doesn't mean that we have to ignore the fact that this is the activities of supremist groups that are designed to be prohibited and that supremist groups target certain people; and clearly that – one other point raised by Mr. Farashahi is that the intent to intimidate would take out [19] permissive cross burnings. Well, we know that

permissive cross burnings get prosecuted and that if a Klan rally, for instance, is taking place, they're clearly intending to send an intimidating message out there into the world. What's missing, of course, is the immediate threat of imminent lawless action. They're sending out a message, We don't like certain people. That's what Klan people do. They target groups they don't like. It's hate; and I think morally it's wrong, but it's also protected; but it's also illegal under the Virginia statute, and that's the problem. It can't be both. It can't be protected under the First Amendment and then outlawed by the Virginia legislature. They don't have that authority.

THE COURT: Okay. Mr. Broccoletti, on your issue – and I know what the words are in the statute, but my question is this. Did you happen to notice – you might have cited it in your brief, but I don't remember. Did you happen to notice if there's a Virginia jury instruction on this point?

MR. BROCCOLETTI: Yes, sir.

THE COURT: And, as you know then from looking at the instruction, it tells the jury that they may infer. That is typically how we handle these type of burden-shifting – this kind of burden-shifting [20] language if it is burden-shifting language from statutes. That's how it would be handled in this case – as an inference, not as a presumption.

MR. BROCCOLETTI: I think that the court before it gets to that point on the instruction, according to the Wilson case, which again has been cited – Wilson talks about that there has to be a rational connection between the facts proved in the case and the presumption was raised

or the inference that the court would seek to instruct the jury on and that the latter did not flow more likely from the former, so I think to some degree the court has to wait to hear the evidence in the case.

THE COURT: That was going to be my next point.

MR. BROCCOLETTI: Yes, sir.

THE COURT: This is an issue that really can only be raised after the evidence is heard, isn't it?

MR. BROCCOLETTI: To some degree, yes, sir; but I wanted to alert the court to that ahead of time so the court would be prepared for that; but I do think that we have to wait and see if there is a rational connection between the evidence produced and the inference that they seek to draw and instruct the jury [21] on.

THE COURT: All right. Thank you. I was going to get to that. All right. Anything else?

MR. FARASHAHI: No, sir. (The hearing recessed at 10:28 a.m. At 11:25 a.m. hearing continued as follows:)

THE COURT: All right. State statutes are entitled to a presumption of constitutionality. That's Horne book law. We all know that. The defendants maintain that as a content-based regulation of speech, this particular code section 18.2-423 is not entitled to such a presumption. They contend the statute violates the First and Fourteenth Amendments of the Constitution and have moved to dismiss this case. For the reasons that follow, the court is going to overrule the defendants' motions.

I found the discussion this morning interesting. However, burning a cross in my opinion constitutes symbolic speech because it is an activity by which a person clearly intends to convey a particularized message; and there is a great likelihood that those who view the message will understand it. Therefore, it is an activity that may be protected by the First Amendment.

Further, the statute in question, 18.2-423, [22] is a regulation of conduct/speech that is content based, it is not content neutral. Clearly, in enacting the statute, the state – clearly, the state has adopted this regulation of statute because of disagreement with the message it conveys and because of its communicative impact. There can be no doubt – at least there's no doubt in my mind that Code Section 18.2-423 was enacted to censure a particular message of intimidation, which, as I said, makes – does not make it content neutral but content based; but because we're dealing with a message of this nature and because we're dealing with a particular message of intimidation, we're not dealing with a situation such as that expressed in Brandenburg. The Brandenburg analysis is not appropriate to the facts and to the statute in this particular case. What we're talking about is a content-based regulation of speech which must be analyzed by the court, and all such content-based regulations are presumptively unconstitutional. However, there are permitted exceptions in a few limited areas.

As the supreme court said in Chaplinsky, It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited [23] classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include

the lewd and obscene, the profane, the libelous and the insulting, or, quote, fighting words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Fighting words are words which by their very utterance inflict injury and intend to incite immediate breach of the peace. Code section 18.2-243 is clearly a legislative attempt to regulate fighting words. The statute does not regulate all cross burnings; it only regulates those done with the intent of intimidating any person or group of persons. Thus, the statute falls within the fighting words exception.

The leading case concerning the regulation of fighting words is well known in R.A.V. In that case the Supreme Court held that even though fighting words fall within a constitutionally proscribable category, the state may not regulate such speech based on [24] hostility, or favoritism, towards a nonproscribable message. In effect, the court ruled that statutes that regulate even fighting words must be neutral and cannot discriminate against certain viewpoints. It ultimately determined that the statute in R.A.V. was unconstitutional because it only prohibited fighting words that insult on the basis of race, color, creed, religion or gender.

As Justice Scalia explained, quote, The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content

embodies a particularly intolerable and socially unnecessary mode of expressing whatever idea the speaker wishes to convey. Saint Paul has not singled out an especially offensive mode of expression. It has not, for example, selected for prohibition. Only those fighting words that communicate ideas in a threatening as opposed to a merely obnoxious manner. Rather it has proscribed fighting words of whatever manner that communicate messages of racial, gender or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.

In the court's opinion, the Virginia statute [25] differs significantly from the Minnesota statute. First, it does not – first, it does single out an especially offensive mode of expression by prohibiting conduct that is done with the intent to intimidate. Second, the statute is not limited to messages of racial, gender or religious intolerance. There is no selectivity in 18.2-243. The statute prohibits the entire class of speech. The statute does not, for example, proscribe only cross burnings done with the intent to intimidate someone on the basis of race or on the basis of national origin. The Virginia statute prohibits all cross burnings done with the intent to intimidate, regardless of the message the perpetrator is attempting to convey and regardless of the social or political viewpoint the cross burner was trying to express. All that matters is that he attempted to send his message, whatever it was, with the intent to intimidate someone.

Now, the defendants have argued because the Virginia statute prohibits only cross burnings, it favors the cross as a religious symbol and is, therefore, content based and unconstitutional under R.A.V. This argument, however, confuses the regulation of a manner of expression with the

regulation of a message. The statute regulates the intimidating manner [26] of expression, which is entirely permissible. The mere fact that the statute does not proscribe all fighting words of all kinds that convey messages of intimidation does not mean that the state is playing favorites. This is simply a constitutionally underinclusive regulation of a larger set of clearly proscribable speech. As explained in R.A.V., the regulation of fighting words may address some offensive instances and leave other equally offensive instances alone; and, as long as those instances of fighting words are regulated are done so in a neutral manner with regard to the message conveyed, there is no constitutional violation. Burning a cross with an intent to intimidate is an extremely hazardous manner of expression. There is a tremendous possibility for terror and violence. Because the statute evenhandedly bans all cases of this particularly dangerous form of expression, it passes constitutional muster.

On the second issue, the defendants have contended that the statute states that the burning – since the statute states that the burning of a cross shall be prima facie evidence of an intent to intimidate, it unconstitutionally shifts the burden of proof to the defendant. It is well settled that the prosecution bears the burden of proving every [27] element of a crime beyond a reasonable doubt. However, inferences and presumptions are a staple of our adversary system of factfinding; and where these presumptions are rebuttable, quote, the general rule is to give such presumptions permissive or burden-of-production-shifting effect only.

The statute in this case creates a rebuttable presumption. The jury, if there is one, will be instructed that the burning of a cross by itself is sufficient evidence from

which you may infer the required intent. The jury may infer, not must infer. Indeed, the presumption could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal.

Recognizing that the statute creates only a permissive inference, it is inappropriate at this time to consider the defendants' argument. As the Supreme Court has instructed, our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the court. None suggests that a court should pass on the constitutionality of this kind of statute on its face. To rule on the defendants' argument at this time, as I think was conceded by Mr. Broccoletti, would be to rule [28] on the constitutionality of the statute on its face. Accordingly, because the party challenging the invalidity of the statute must demonstrate its invalidity as applied to him, it will be necessary to determine the facts of the case, which can only be accomplished by the defendant going to trial. For those reasons, the motions of the defendants are denied.

MR. BROCCOLETTI: If the court would note our objection and exception.

MR. MARTINGAYLE: For the record, note our exception.

Judge, just for the record, I wanted to make the record clear that while you were out and for the benefit of opposing counsel, I had your clerk convey to you that we did find a cite in R.A.V. of Brandenburg at 2553 in the Supreme Court Reporter Addition, Footnote 4; and I don't know if you were made aware of that or not, but I wanted to make sure –

THE COURT: I think you made the point; so, yes, I did see it.

MR. MARTINGAYLE: Yes, sir.

(The hearing was concluded at 11:36 a.m.)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: JANUARY 20, 1999
JUDGE: ROSENBLATT

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT

INDICTMENT FOR:
CONSPIRACY
ATTEMPTED CROSS BURNING TO INTIMIDATE

ORDER – CASE NO.: CR98-3631

Court Reporter: Ronald Graham & Associates, Inc.

This day came A. Farashahi and S. Vachris, attorneys for the Commonwealth, the defendant, in person, and J. Broccoletti, attorney for the defendant.

After receiving briefs and hearing argument of counsel, the Court denied defendant's motion to dismiss the above charges for the reasons stated on the record.

This matter is presently set for motions on February 2, 1999.

ENTERED: 1-25-99

/s/ AR
JUDGE

VIRGINIA: CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA	)	EXCERPTS
vs	)	CR98-3631
RICHARD J. ELLIOTT,	)	
Defendant.	)	

Before Hon. Frederick B. Lowe, Judge; and jury

Virginia Beach, Virginia

February 22, 1999

APPEARANCES: Office of the Commonwealth's Attorney (Mr. Afshin Farashahi and Mr. Scott C. Vachris), attorneys for the Commonwealth.

Zoby and Broccoletti (Mr. James O. Broccoletti), attorneys for the the defendant.

* * *

[2] JAMES STANLEY JUBILEE, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. VACHRIS:

Q Good afternoon. Please state your name for the jury, and spell your name for the court reporter.

A My name is James S. Jubilee. Spelling is J-a-m-e-s. Middle is S for Stanley. Last name is Jubilee. J-u-b-i-l-e-e.

Q Mr. Jubilee, how old are you?

A I'm forty-two.

Q Mr. Jubilee, where do you live?

A I live at 2044 Munden Point Road, Virginia Beach, Virginia 23457.

Q And how long have you lived at this address?

A Approximately four months. Four and a half months now.

Q And prior to living there what town did you live in?

A Prior to living there?

Q Yes.

A I lived in Virginia Beach prior to that.

[3] Q And where did you live before that?

A In the Kempsville – you mean before then?

Q Yes.

A I was in California. Los Angeles.

Q And, Mr. Jubilee, who do you live at your house – who lives at your house on Munden Point Road?

A My wife, and I have two sons that reside with me at my home on Munden Point Road.

Q And just briefly. What made you move back from California back east?

A I was born and raised here. Went to school here and finished college here. All my family is here; and living in California with all the crime and the negativity that you have in California, I wanted to come back to a more pleasant environment. A better environment to raise my family and my sons, and hopefully two other kids on the way as well.

Q And what type of neighborhood is Munden Point Road?

A Now or then?

Q I mean is it very suburban? Is it more rural? Just give a general description.

A It's more a rural setting. It's out in the country. We call it – it's ideal to have for my sons to run, to have fun, to burn energy off. We have two dogs now, [4] a cat. We figured it would be a great family setting.

Q And you lived there for how long before May 2nd?

A It was about four months before May 2nd. We haven't been there long, but before May 2nd was about four months.

Q Before May 2nd did you have an opportunity to meet any of your neighbors?

A Yes. We met the neighbors, the Elliotts, next door.

Q And did you have conversations with them?

A I had a conversation with Mrs. Elliott one day; and we were talking, and I inquired about the fact that there was some shooting going on in the rear of the home; and I was trying to inquire as to why it was there or what was

going on just because of my sons in the yard, and they play sometimes; so for security purposes I wanted to find out just what was happening; and so I inquired, and she said it was Mr. Elliott's hobby. He basically goes in the back and he has a firing range.

My concern at that time was – which I didn't mention to her – was that there were other people coming by who were also going back there and using the firing range, and I always felt like you have to be a professional or you have to be trained I think to actually use a firearm in the [5] presence of other people be it next door – it doesn't matter. Bullets go wherever they go.

Q Did you voice any concerns to Mrs. Elliott?

A At that time I didn't because I was new to the neighborhood, not knowing exactly the people next door. Could have very well been a thing that would have been safe. I didn't know; so I didn't say a lot along those lines.

Q Was this conversation cordial?

A Cordial. Absolutely. Very cordial.

Q What type of work do you do, Mr. Jubilee?

A I'm a realtor with Remax Central Realty in Virginia Beach.

Q And drawing your attention to the evening of May 2nd, were you working that day?

A Yes, I was.

Q And about what time did you get home?

A May 2nd I got home about 10:15, 10:30 I guess that evening from work.

Q And anything unusual when you got home?

A No. Just a normal day and normal evening. Coming home with the family.

Q Anything unusual happen that evening while you were at home?

A No. I got home in the evening. We had dinner and watched a little bit of TV with the kids and went to bed [6] about 11:30, 12:00, thereabouts.

Q Did you have to go to work the next morning?

A Yes, I did.

Q It was a Sunday morning?

A Yes.

Q About what time did you leave the house?

A I left the home that morning about, oh, I think it must have been at about 8:15, 8:30, thereabouts.

Q Okay. And explain to the members of the jury what happened when you left the house.

A As I was in my vehicle pulling out of my driveway – just a normal thing of driving out – and I looked to the right side, and I see something standing up at the right side which is not nothing that's normally there. I didn't know what it was, and looked over and took a double take because I couldn't believe what I really saw. I thought it might have been some of the kids were out playing or something like that; and turned out, I talked to the kids, and it wasn't anything that they were playing or anything; so it turned out that it was a cross; and the closer I got to the cross, I recognized that the cross was – looked like

somebody was trying to burn the cross; so I became furious.

Q How far was this cross from your house?

A Less than twenty feet from my house.

Q And when you saw the cross, what did you do [7] with it?

A Picked it up, in anger broke the cross, was furious; and the first thing I thought was I don't want my family to see this. I didn't want my sons, especially my nine-year-old, to see this; so what I did was took the cross and carried it to the garage and locked the door.

Q Why did you think they had tried to burn it?

A Because of the burn spots that were on the cross.

Q Did you notice anything else unusual about the yard?

A Yeah. It looks as though they were in the truck or something. They drove in the yard, and this is my assumption based on what I've seen.

Q Did you see tire tracks?

A I saw tire tracks. Yes.

Q And had the tire tracks been there the preceding night?

A Before then, no. They weren't. They had been in and circled around.

Q And you testified that you broke the cross over your leg?

A Yes, I did.

Q Why did you do that?

A Just angry. I was upset because I'm not – we [8] came to Virginia, again, to get away from all the riffraff of L.A. We've seen all this sort of thing happen in L.A.

Q After you put the cross in the garage, how did you feel after that? What transpired after that?

A I was worried number one. I didn't want them to know about the cross, but I had to go to work as well; so after I went to work, I thought to myself I need to call my wife and let her know what's going on because she was not home at the time. I didn't know what would be the next phase of this if you will. I had no idea. This has never happened to me or my family or anyone that I know before; so I had no idea what the next thing would be; so my thought was I need to call the wife so she can inform the kids and be aware of what's going on if something does happen.

At that point and stage I became very nervous, not knowing what else was going to happen; and the thought is you look at these things and you see it on TV. You don't normally ever know anybody who has a cross burned in your yard other than you see it on TV; and when you see [9] television, it tells you that it's just the first round out of it.

* * *

Q Mr. Jubilee, I'm going to show you – and I know it was previously marked as Commonwealth's Exhibit Number 1. What do you see before you?

A Two pieces of sticks with nails in them.

Q Do they look familiar to you?

A Yes, they do.

Q How do they look familiar to you?

A It looks like it's the same cross that I broke over my knee in my front yard.

Q And when you first saw it – the cross – was it in that condition?

A No, it wasn't. It was – it was in my front yard, and it was erected. It was standing up in my front yard about twenty paces from my home.

Q And you testified earlier that you saw some burn marks on the cross. Do you see the burn marks on that [10] exhibit?

A Yes, I do.

Q Please point them out to the ladies and gentlemen of the jury.

A All this.

Q You – while you have the cross, you want to show them how it looked when you found it on your yard?

A It was kind of like – yeah. It was like – the burn was at the bottom. It was like that. Like that.

Q All right. And where did you place this?

A In my garage after I broke it across my knee.

* * *

Q Mr. Jubilee, I'm going to show you a photograph. Please explain to the members of the jury what you see in that photograph.

A That's my front yard with my flowers and my [11] home. Pine trees, apple trees in the front yard as well.

Q Let me ask you a favor. Let me give you a pen. I want you to mark on the picture where you saw the cross that morning.

THE COURT: Just put an X there if you would.

THE WITNESS: Right there.

THE COURT: Can you see where the X is, Mr. Vachris?

MR. VACHRIS: Yes, sir. Thank you. Your Honor, we would move to introduce the photographs as Commonwealth's Exhibit Number 2.

* * *

Q Mr. Jubilee, prior to May 2, 1998, did you ever meet and come in contact with David Targee?

A No.

Q Prior to that same day did you ever come in contact with Jonathan O'Mara?

A No.

Q Prior to that date did you ever come in contact [12] with Richard Jason Elliott?

A No.

Q Okay. Did you ever see – when you said you spoke with the Elliotts, did you ever meet any of their family in the – family members besides Mrs. Elliott?

A Initially no.

Q Prior to May 2nd had you seen anybody else?

A Did I see anybody?

Q Yes.

A I've seen Mr. Elliott – the younger Elliott – where I have waved to him before from a distance, but never up front, up close.

Q Is he in the courtroom today?

A Yes. This young man right here.

MR. VACHRIS: Your Honor, please let the record reflect that the witness has identified the defendant sitting at counsel table.

THE COURT: All right.

BY MR. VACHRIS:

Q And you had never had any conversations with him?

A No.

Q But you had seen him, waved to him while you were driving away?

[13] A He was coming out of his driveway, which my driveway is parallel to his. I was coming in one day. He was coming out. I waved.

MR. VACHRIS: Thank you, Mr. Jubilee. Please answer any questions of Mr. Broccoletti or the court.

THE WITNESS: Yes.

CROSS-EXAMINATION

BY MR. BROCCOLETTI:

Q Mr. Jubilee, I take it, then, that you really had no words with, as you call him, the young man – the younger Elliott?

A Correct.

Q That be fair to say?

A That would be fair to say.

Q You mean he never spoke to you? You really never spoke to him?

A No. We spoke before.

Q Oh. You have spoken before you waved?

A Oh. In the wave. I'm sorry. Right.

Q But other than that?

A Not that I know of. No.

Q No type of ill will or malice directed from him towards you?

[14] A None that I know of. No.

Q No other kind of confrontation or problems that you knew of from him to you?

A No confrontation. No.

Q And you had never spoken to him and was upset with him or said anything to him?

A I had spoken to him before as I said a while ago.

Q Sir?

A I have spoken to him before.

Q Just to say hi as the neighbor would say hi?

A Yes.

Q And that would be the extent of it?

A Yes.

Q When you approached Mrs. Elliott in the courtroom sitting here today –

A Correct.

Q When you approached her, I think that you said that you had not voiced your concerns to her. Would that be correct?

A Be more explicit on your question.

Q At the time that you approached her after you first moved in, it was a visit from one neighbor to another?

A Well, she visit my home and – it wasn't a visit like that. Her dogs had crossed over in my yard, and [15] she was coming back to retrieve her animals. At that point in time we spoke.

Q And at that point in time you spoke to her about the – you had heard some shots or you had seen a shooting range that was in the backyard?

A Right.

Q But at that point you didn't voice any concerns that you told us about people walking in the back when the shooting was going on?

A I had voiced concerns about the shooting going on. I had not voiced concerns at the time or things about people going in the backyard.

Q You had not asked her to stop the shooting?

A No. I did not.

Q And you had not asked her to ask her son to stop the shooting?

A No. I did not.

Q When you said – when you spoke to her about the range, did you specifically mention in the context of her son?

A No.

Q You just talked about it in general?

A The context was not about her son. It was about the shooting. Period.

Q And just the range being there?

[16] A The range being there and the firing going on. It was my concern of safety for my children more than anything else.

Q So you never asked her to speak to – you never asked Mrs. Elliott to speak to Richard?

A I did not.

Q And you never made any complaints to her about Richard?

A I did not.

Q Did you – and you never spoke to Richard about that?

A No, I didn't.

Q Now, on the morning of the 2nd you – or the morning of the 3rd when you came out of your house and you saw these two pieces of wood put together, they weren't burning at that point, were they?

A No. They weren't burning.

Q There was no flame?

A No flame.

Q And you did not walk up to them to touch them to see if they were still warm to the touch?

A I did not.

MR. BROCCOLETTI: Thank you.

THE COURT: Anything else?

MR. VACHRIS: No redirect, Your Honor.

[17] THE COURT: All right. Thank you, Mr. Jubilee. You may step down.

MR. VACHRIS: Your Honor, we don't anticipate calling Mr. Jubilee again. We ask that he be excused.

MR. BROCCOLETTI: That's fine.

THE COURT: You are excused, Mr. Jubilee. You are free to go or remain in the courtroom. Whichever.

Who do you have next, Mr. Vachris?

MR. VACHRIS: Anticipate calling David Targee right now.

THE COURT: Well, I think we talked about at least your direct testimony; so let's go ahead with that.

MR. VACHRIS: Thank you, Your Honor.

DAVID TARGEE, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. VACHRIS:

Q Good afternoon. Please state your name for the [18] ladies and gentlemen of the jury, and spell it for the court reporter.

A David Targee. T-a-r-g-e-e.

Q David, how old are you?

A I'm seventeen.

* * *

[19] Q David, how long have you known the defendant?

A Probably about three, three and a half years.

Q Okay. How do you know him?

A I know him from school.

Q And did you see him on the evening of March 2, 1998?

A Yes, I did.

Q And where did you see him?

A He was at my house.

[20] Q I just want – his name is?

A Richard Elliott.

Q Is he in the courtroom today?

A Yes, sir.

Q Please point him out.

A He's sitting right there.

MR. VACHRIS: Your Honor, let the record reflect that the witness identified the defendant.

* * *

Q And what was going on at your house?

A I was having a party.

Q Okay. About how many people were there that night?

A I'd say no more than twenty at a time.

Q And was it Jonathan O'Mara there as well?

A Yes, sir.

Q Okay. And was there beer at that party?

A Yes.

Q Were you drinking a lot of beer that night?

A Yes. We all were.

Q Was Jonathan O'Mara drinking beer?

A Yes, sir.

[21] Q Do you remember if Richard Elliott was drinking?

A Yes.

Q And when the party started, do you remember anything unusual that Richard Elliott said?

A No. Not at first. I mean as the night progressed he said something about his neighbors were complaining about him shooting in his backyard or something like that. He wanted to get back at them for doing it or something to that effect.

Q And do you remember where he said that?

A Where?

Q Yes.

A He said it in my backyard.

Q And what was your reaction when he said that?

A I was like, All right. You know, whatever. You know, whatever you want to do; and I'd say probably twenty minutes later he come up to me and John and said that, Let's go burn a cross in their yard.

Q And when you say John, who do you mean by that name?

A Jonathan O'Mara.

Q Okay. What did you think when you heard that?

A I was like, well, you know, all right. Well, let's go. I didn't think of it to be that big of a deal at [22] the time.

Q Do you know who these neighbors were that the defendant was talking about?

A No. I did not.

Q Was there anybody else present when the defendant mentioned about burning a cross?

A No. It was just me, Richard, and John.

Q Were there other people at the party?

A Yeah. I think there was still a couple left.

Q Okay. And after the defendant coming up with this idea, what happened?

A Well, I'd say probably five minutes had gone by; and, you know, we got back together; and we went into the garage and built the cross.

Q Who built the cross?

A The three of us. Me, Richard, and John.

Q And how long did it take you?

A A matter of a couple of minutes.

Q And you sure that it was all three of you building it?

A Yes, sir.

Q And after the cross was built, what did you do?

A We went and got into my Bronco and proceeded down to Munden Point Road.

Q Who was driving?

[23] A I was.

Q Who else was in the car?

A Jonathan and Richard.

Q Where was Jonathan?

A He was in the passenger's seat.

Q Where was the defendant?

A He was in the back seat.

Q All right. Did you know how to get to Munden Point Road?

A Yeah. I know how to get to Munden Point Road.

Q What happened when you got to Munden Point Road?

A I turned down it, and I turned back to Richard and told him to point out the house when we get there.

Q And what did he say?

A He said, All right. So we kept on going a little ways down the road more, and he pointed over there. He said, That's where they live. That's where the asshole lives or assholes live or son of a – nigger lives or son of a bitch or something. I don't remember the exact words, but it was somewheres in that area.

Q Had you ever been to his house before?

A No, sir.

Q Do you remember approximately what time this was?

[24] A I don't know. I'd say between 12:00 and 12:30 maybe.

Q Evening?

A At night.

Q What did you do?

A When he pointed out the house, I drove up a little ways more; and I turned around on the road and come up and backed into the driveway.

Q And how far did you back in the driveway?

A Far enough to where my truck wasn't sitting on the road.

Q Okay. And what happened at that time?

A Richard handed the cross to John. John – if John asked him to give it to him or if Richard did it voluntarily – I don't remember exactly how that went about; and John reached into my center console, got the lighter fluid, and hopped out and went and put it in the ground.

Q Did you see him put it in the ground?

A I saw a little bit of it. I was looking more at the road more than I was at the yard.

Q Why were you looking at the road?

A See if anybody was coming.

Q And then did you see anything else that Jonathan did?

A I seen a little flicker of a flame; and he [25] hopped back in the truck and said, Let's go; and we left.

* * *

[61] [Direct – J. Luning]

Q Good afternoon. Would you please state your name; and spell your last name for the court reporter, please.

A It's Jennifer Luning. L-u-n-i-n-g.

Q And, Miss Luning, how old are you?

A Nineteen.

[62] Q Miss Luning, do you know a David Targee?

A Yes, sir.

Q And do you know a Jonathan O'Mara?

A Yes, sir.

Q And do you know a Richard Jason Elliott?

A Yes, sir.

Q And do you see Mr. Elliott here today?

A Yes, sir.

Q If you could, just tell us where he is sitting.

A He's right over there next to the door.

MR. FARASHAHI: For the record, the witness has identified the defendant.

THE COURT: All right.

BY MR. FARASHAHI:

Q Miss Luning, let's talk about Mr. Jonathan O'Mara; and let's go back to May of 1998. How did you know Jonathan O'Mara at that time? What was your relationship?

A We had been dating at that time.

Q And how long had you been dating?

A About five or six months. Five months.

Q Miss Luning, you are familiar with the cross-burning incident that happened on the night of May 2nd?

A Yes, sir.

Q And where were you that night?

[63] A At my house.

Q At your house?

A Yes, sir.

Q And that night did you speak with Jonathan O'Mara?

A Yes, sir.

Q And you spoke to him over the phone?

A Yes, sir.

Q After that night did you have occasion to have another conversation with Jonathan O'Mara?

A Yes, sir.

Q And how long after that night did you have this conversation with Jonathan O'Mara?

A A few weeks.

Q Okay. And where did this conversation take place?

A At his house. In his home.

Q What did you guys talk about?

A The cross-burning. I had asked who – if he knew who had done it, and he said that the three of them did.

Q Let's stop right there. Jonathan O'Mara said the three of them had done it?

A Yes, sir.

Q And which three was he talking about?

A Himself, David Targee, and Richard Elliott.

[64] Q And tell us what he told you what each person did.

A Well, he said David had been driving the vehicle and that he was in the passenger's seat and had actually gotten out of the truck.

Q He, being Jonathan O'Mara?

A Yes, sir; and that Richard was in the back seat.

Q This is Richard Elliott?

A Yes, sir.

Q And did he tell you anything else?

A As far as that night?

Q Yes, ma'am.

A No, sir.

Q Did you discuss or did he tell you whose idea it was or what prompted this to happen?

A He had said that before they actually went out and did it that there was a conversation taking place about Richard had been complaining or the neighbors had been complaining about shooting in the backyard guns.

Q Let's slow down here. Who did he say was complaining about – the neighbors?

A The Jubilee family.

Q And who was making – who was talking about the complaining neighbors?

[65] A Richard.

Q Richard Elliott?

A Yes, sir.

Q And what did Jonathan O'Mara say Richard Elliott said?

A That they had made complaints about the shooting, and that he had been upset – Richard was upset – that they were complaining; that they had complained.

* * *

COMMONWEALTH OF VIRGINIA

v.

Richard J. Elliott

INSTRUCTION NO. 1

The Court instructs the jury that the defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

[given
2/22/99
/s/ FBL]

INSTRUCTION NO. 5

The Court instructs the jury that the defendant is charged with the crime of attempted cross burning. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

1. That the defendant intended to commit cross burning; and

2. That the defendant did a direct act toward the commission of the cross burning which amounted to the beginning of the actual commission of the cross burning; and

3. That the defendant had the intent of intimidating any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

[given
2/22/99
/s/ FBL]

INSTRUCTION NO. 7

The Court instructs the jury that the intent required to be proved in an attempted crime is the specific intent in the person's mind to commit the particular crime for which the attempt is charged. In determining whether the intent has been proved, you may consider the conduct of the person involved and all the circumstances revealed by the evidence.

[given
2/22/99
/s/ FBL]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: FEBRUARY 23, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

OFFENSE:	OFFENSE DATE:
CONSPIRACY	MAY 2, 1998
ATTEMPTED CROSS BURNING TO INTIMIDATE	MAY 2, 1998

CRIMINAL ORDER – Case No.: CR98-3631

Attorney for the Commonwealth:	S. Vachris and A. Farashahi
Attorney for the Defendant:	J. Broccoletti
Court Reporter:	Ronald Graham & Associates, Inc.

The defendant was again present, in person, and represented by counsel.

This day came again a jury sworn for the trial of this case.

The jurors were again sent to the jury room to consider their verdicts. They subsequently return in open court the following verdicts:

1. We, the jury, find the defendant **GUILTY** of Attempted Cross Burning to Intimidate.

2. We, the jury, find the defendant **NOT GUILTY** of Conspiracy.

After the jury returned its verdicts, the defendant moved to poll the jury and all the jurors affirmed their vote as to the verdicts.

A separate proceeding limited to the ascertainment of punishment was held before the same jury. After hearing further evidence and argument of counsel, the jurors were sent to the jury room to consider punishment. They returned in open court the following verdict:

1. We, the jury, having found the defendant **GUILTY** of Attempted Cross Burning to Intimidate, fix his punishment at: confinement in jail for 90 days and a fine of $2,500.00.

After the jury returned its verdict, no motion was made to poll the jury as to its verdict.

The Court confirmed the jury's verdict finding the defendant **GUILTY** of Attempted Cross Burning to Intimidate and **NOT GUILTY** of Conspiracy, of which charge the defendant stands acquitted.

The case was continued until April 26, 1999 for sentencing. The Court ordered the Probation Office to prepare a presentence report.

The Clerk shall send a copy of this order to the Probation Office of this Court.

Bond Status: The defendant was continued on the same bond previously posted.

ENTERED: 2/25/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
RICHARD J. ELLIOTT, DEFENDANT
SSN: 231-23-9687
DOB: 8/16/79

SENTENCING ORDER – CASE NO.: CR98-3631

Attorney for the Commonwealth: A. Farashahi and S. Vachris
Attorney for the Defendant: J. Broccoletti
Court Reporter: Ronald Graham & Associates, Inc.

The defendant was again present and represented by counsel.

On February 23, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

In accordance with the jury's verdict, the Court **SENTENCES** the defendant to:

Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00.

The defendant shall pay costs of $1,393.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: APRIL 26, 1999
JUDGE: LOWE

COMMONWEALTH OF VIRGINIA
vs
JONATHAN STEPHEN O'MARA, DEFENDANT
SSN: 226-35-0947
DOB: 7/15/79

SENTENCING ORDER – CASE NO.: CR98-3193

Attorney for the Commonwealth:	A. Farashahi and S. Vachris
Attorney for the Defendant:	K. Martingale and M. Del Duca
Court Reporter:	Ronald Graham & Associates, Inc.

The defendant was present and represented by counsel.

On February 22, 1999 the defendant was found GUILTY of the following offense:

OFFENSE (F/M)	DATE	SECTION
Attempted Cross Burning to Intimidate – F	5/2/98	18.2-423; 18.2-26
Conspiracy – F	5/2/98	18.2-22; 18.2-423

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

> Incarceration in the jail of this City for the term of 90 days and imposes a fine of $2,500.00 on each of the charges of Attempted Cross Burning to Intimidate and Conspiracy. The sentences shall run concurrently with each other for a total sentence imposed of 90 days in jail and $2,500.00 fine.

The Court **SUSPENDS** 45 days of the 90-day jail sentence and $1,000.00 of the $2,500.00 fine conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for a period of 1 year.
2. **Costs.** The defendant shall pay costs of $433.00.

The Court, having been advised of the defendant's intention to appeal the matter to the Court of Appeals of Virginia, stayed the execution of the sentence and granted the defense attorney's motion to allow the defendant to remain on the same bond previously posted pending the appeal.

ENTERED: 5/6/99

/s/ FBL
JUDGE

clerk: ssm

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Bray and Bumgardner
Argued at Chesapeake, Virginia

JONATHAN STEPHEN O'MARA

v. Record No. 0992-99-1

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 0997-99-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RICHARD S. BRAY
OCTOBER 3, 2000

FROM THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH
Frederick B. Lowe, Judge

Kevin E. Martingayle (Stallings & Richardson, P.C., on briefs), for Jonathan Stephen O'Mara.

James O. Broccoletti (Zoby & Broccoletti, on brief), for Richard J. Elliott.

H. Elizabeth Shaffer, Assistant Attorney General; John H. McLees, Jr., Senior Assistant Attorney General (Mark L. Earley, Attorney General, on briefs), for appellee.

Pursuant to the terms of a plea agreement, Jonathan O'Mara pled guilty to "Attempted Cross Burning" and "Conspiracy to Commit a Felony," violations of Code §§ 18.2-423 and 18.2-22, respectively, expressly reserving the right to appeal a prior order of the trial court which

denied his challenge to the constitutionality of Code § 18.2-423. In a separate proceeding, Richard J. Elliott, codefendant with O'Mara, was convicted by a jury for attempted cross burning, after joining with defendant O'Mara in the unsuccessful challenge to the constitutionality of Code § 18.2-423 before the trial court.[1]

Accordingly, both O'Mara and Elliott (defendants) maintain on appeal "that the code section is unconstitutional as violative of the free speech and expression protections" guaranteed by both the United States and Virginia Constitutions. Joining the two appeals for resolution by this Court, we affirm the respective convictions.

I.

The substantive facts are uncontroverted. On the evening of May 2, 1998, defendants, together with "approximately fifteen individuals," were "consuming alcohol" at the Virginia Beach home of David Targee. When defendant Elliott expressed unspecified "complaint[s] . . . about his neighbor," James Jubilee, and his desire to "'get back' at him," someone "suggested that they burn a cross in [Jubilee's] yard." In response, Targee and defendants immediately constructed a crude cross in Targee's garage and proceeded in Targee's truck to the Jubilee home. Elliott "handed the cross" to defendant O'Mara, who erected and ignited it on Jubilee's property, and the three

[1] Although Judge Lowe presided at the trials of both O'Mara and Elliott, defendants' constitutional challenges were decided by Judge Alan E. Rosenblatt, following an extensive hearing and related argument and memoranda of law.

returned to Targee's residence. The respective records do not clearly specify Jubilee's race.

Jubilee later discovered the "partially burned cross" and notified police, resulting in the subject prosecutions for violations of code § 18.2-423 and the attendant conspiracy.

II.

Code § 18.2-423 provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Defendants contend that the statute impermissibly infringes upon expressive conduct, speech protected by the First and Fourteenth Amendments to the Constitution of the United States and Article I, § 12 of the Virginia Constitution, and, therefore, is "plainly unconstitutional."[2]

[2] "[L]itigants may challenge a statute on first amendment grounds even when their own speech is protected." *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 241-42 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

"'In assessing the constitutionality of a statute . . . [t]he burden is on the challenger to prove the alleged constitutional defect.'" *Woolfolk v. Commonwealth*, 18 Va. App. 840, 848, 447 S.E.2d 530, 534 (1994) (quoting *Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991)).

> "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption is one of the strongest known to the law." *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

Moses v. Commonwealth, 27 Va. App. 293, 298-99, 498 S.E.2d 451, 454 (1998).

The First Amendment declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment prohibits state action in violation of the First Amendment.

Similarly, Article I, § 12 of the Virginia Constitution establishes:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

"Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth*, 21 Va. App. 729, 739-40, 467 S.E.2d 306, 311 (1996).

Although "[t]he First Amendment literally forbids the abridgement only of 'speech,'" the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In identifying expressive conduct, the Court must determine "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (alterations in original) (quoting *Spence*, 418 U.S. at 410-11). If so, a proscription of such activity by government "because of disapproval of the ideas expressed" is "content based" suppression of free speech, offensive to the First Amendment and "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

However, "our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any

benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, First Amendment protection "does not include a freedom to disregard these traditional limitations," thereby allowing government to regulate obscenity, defamation, "fighting words," *id.* at 383 (citing *Chaplinsky*, 315 U.S. at 572), and threats of violence. *See id.* at 383, 388 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)); *see also In re: Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Ct. App. 1994) (holding that threats and fighting words are "remove[d] . . . from the scope of the First Amendment"); *Florida v. T.B.D.*, 656 So. 2d 479, 480-81 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996) (concluding that threats of violence and fighting words are proscribable because government has "valid interest" in protecting citizens both from fear of violence and violence).

The "'true threat'" doctrine articulated by the Supreme Court in *Watts* permits punishment of actual speech or expressive conduct "when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm." *In re: Steven S.*, 31 Cal. Rptr. 2d at 647 (citing *Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990)). Similarly, the Court's "fighting words doctrine" expressed in *Chaplinsky* removes the shield of the First Amendment from "statements 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting *Chaplinsky*, 315 U.S. at 572); *see Cohen v. California*, 403 U.S. 15, 20 (1971) (describing fighting words as expressions likely to provoke a violent reaction when directed to another).

Here, the provisions of Code § 18.2-423 specifically prohibit the burning of a cross "on the property of another, a highway or other public place," "with the intent of intimidating any person or group of persons." Historically, a flaming cross is "inextricably linked . . . to sudden and precipitous violence - lynchings, shootings, whippings, mutilations, and home-burnings," a "connection . . . [with] forthcoming violence [that] is clear and direct." *T.B.D.*, 656 So. 2d at 481. Hence, "a burning cross conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1992).

Manifestly, the pernicious message of such conduct, a clear and direct expression of an intention to do one harm, constitutes a true threat envisioned by *Watts*, irrespective of racial, religious, ethnic or like characteristics peculiar to the victim. Moreover, the attendant fear and intimidation subjects the victim to an immediate and calculated injury that invites a breach of the peace, fighting words within the intendment of *Chaplinsky*. Thus, although such expressive conduct doubtless constitutes speech, the prohibition of which unavoidably implicates content, the message is beyond the protection of the First Amendment and appropriately subject to proscription by government.

Defendants' reliance upon *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to support the contention that Code § 18.2-423 unconstitutionally prohibits "merely intimidating someone," at once ignores the well-established symbolism of the burning cross and misapplies *Brandenburg*. *Brandenburg* addressed a challenge to the constitutionality of Ohio's "Criminal Syndicalism statute," which proscribed, *inter alia*, the "'advocacy . . . [of] the duty, necessity, or propriety of crime, sabotage, violence or

unlawful methods of terrorism as a means of accomplishing industrial or political reform.'" *Id.* at 444-45. Thus, the *Brandenburg* Court was concerned with the propriety of governmental restrictions on the "advocacy of the use of force or of law violation" in the context of a reform movement, an issue unrelated to the vile and malevolent expression contemplated by Code § 18.2-423. *Id.* at 447. Accordingly, the *Brandenburg* admonishment that states may "forbid or proscribe [such] advocacy" only if "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" does not similarly delimit proscribable threats and fighting words. *Id.*

Defendants' assertion that *R.A.V. v. St. Paul* "makes it clear . . . § 18.2-423 is unconstitutional" is, likewise, without merit. *R.A.V.* examined the constitutionality of a St. Paul, Minnesota ordinance, which provided, in pertinent part,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380 (citing Minn. Legis. Code § 292.02 (1990)). Unlike code § 18.2-423, which proscribes cross burnings with the intent to intimidate anyone, the St. Paul ordinance prohibited such "speech solely on the basis of the subjects the speech addresses," race, color, creed, religion or gender. *R.A.V.*, 505 U.S. at 381.

In declaring the enactment unconstitutional, the Supreme Court accepted the "authoritative statement" by the Minnesota Supreme Court "that the ordinance reaches only those expressions that constitute 'fighting words,'"[3] *id.* at 381, and reaffirmed the doctrine that "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* – (obscenity, defamation, [threats, fighting words] etc.)." *Id.* at 383 (emphasis in original). However, the Court cautioned that such "categories of speech [are not] entirely invisible to the Constitution" and cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. Thus, when "St. Paul . . . proscribed fighting words of *whatever* manner that communicates messages of racial, gender or religious intolerance," the city impermissibly engaged in "[s]electivity [which] creates the possibility that [it] is seeking to handicap the expression of *particular* ideas." *Id.* at 394 (emphasis added); *see In re: Steven S.*, 31 Cal. Rptr. 2d at 649 ("speech and expressive conduct may be regulated [but] such regulation may not discriminate within that category on the basis of content"); *T.B.D.*, 656 So. 2d at 4781 (such regulation may not "play [ ] favorites").

In contrast, Code § 18.2-423 regulates, without favor or exception, conduct, which, despite elements of expression and content, is unprotected by the First Amendment.[4]

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[3] In overruling defendants' constitutional challenges in the instant prosecutions, Judge Rosenblatt also determined that code § 18.2-243 regulated fighting words.

[4] Post-*R.A.V.* decisions of other jurisdictions cited by defendant in support of a different result involve statutes substantially dissimilar

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Finally, defendant challenges Code § 18.2-423, first, as overbroad, regulating both protected and unprotected speech, and, secondly, as underinclusive, ignoring other modes of proscribable speech. However, overbreadth assumes constitutional dimension only when "'there [is] a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the court.'" *Parker v. Commonwealth*, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)). The prohibition of Code § 18.2-423 is expressly limited to a person or persons burning a cross with the specific intent to intimidate another, a threat and fighting words unworthy of First Amendment guarantees. Further, underinclusiveness is condemned by *R.A.V.* only if the result is content discrimination. *See R.A.V.*, 505 U.S. at 387. Code § 18.2-423 criminalizes a long recognized, particularly virulent and

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from Code § 18.2-423. *See Pinette v. Capitol Square Review and Advisory Bd.*, 874 F.Supp. 791 (S.D. Ohio 1994) (statute established permit requirements to conduct public assembly); *State v. Shelton*, 629 A.2d 753 (Md. 1993) (statute proscribed cross burning to protect property owners from unwanted fires and safeguard community from fires generally); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (statute proscribed messages based upon race, color, creed or religion); *State v. Talley*, 858 P.2d 217 (Wash. 1993) (statute proscribed certain conduct related to the race, color, religion, ancestry, natural origin, or mental, physical or sensory handicap of another).

In contrast, jurisdictions examining the constitutionality of statutes more akin to Code § 18.2-423 are in accord with our conclusion. *See In re: Steven S.*, 31 Cal. Rptr. 2d 644 (statute proscribed cross-burning intended to terrorize owner or occupant); *T.B.D.*, 656 So. 2d 479 (statute proscribed burning of cross on property of another without permission).

incendiary mode of proscribable expressive conduct, a prohibition free of content discrimination.

We, therefore, conclude that Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence. The statute does not discriminate in its prohibition and is neither overbroad nor underinclusive.

Accordingly, we affirm the convictions.

Affirmed.

[IN THE SUPREME COURT OF VIRGINIA]

Present: Carrico, C.J., Lacy, Hassell, Koontz, Kinser, and Lemons, JJ., and Whiting, S.J.*

BARRY ELTON BLACK

v. Record No. 010123

COMMONWEALTH OF VIRGINIA

RICHARD J. ELLIOTT

v. Record No. 003014

COMMONWEALTH OF VIRGINIA

JONATHAN O'MARA

v. Record No. 010038

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE DONALD W. LEMONS
November 2, 2001

FROM THE COURT OF APPEALS OF VIRGINIA

In these appeals, we consider whether Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech. The case of *Black v. Commonwealth* involves a Ku Klux Klan rally on private property with the permission of the owner, where a cross was burned as a part of the ceremony. The companion cases of *O'Mara v. Commonwealth* and *Elliott v. Commonwealth* involve the attempted burning of a cross in the backyard of the home of James S. Jubilee ("Jubilee"), an African-American, without permission. We conclude that, despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad.

* Justice Keenan did not participate in the hearing and decision of this case.

FACTS AND PROCEEDINGS BELOW

The prosecutions of Richard J. Elliott ("Elliott") and Jonathan O'Mara ("O'Mara") arose from a single incident in the City of Virginia Beach. On May 2, 1998, Elliott and O'Mara attended a party at the home of David Targee ("Targee"). Elliott told several people at the party that his neighbor, Jubilee, had complained about the discharge of firearms in Elliott's backyard. In response, Elliott suggested they burn a cross in Jubilee's yard.

Elliott, O'Mara, and Targee hastily constructed a crude wooden cross in Targee's garage. While transporting the cross to the Jubilee home, Elliott referred to Jubilee with a racial epithet confirming Jubilee's race. Upon arriving at Jubilee's home, O'Mara put the cross in the ground and attempted to light it.

In addition to the epithet, the record is replete with references to Jubilee's race. In the Commonwealth's motion for joinder of defendants in the Elliott and O'Mara cases, it is stated: "Mr. James Jubilee is an African-American." A fire investigator with the City of Virginia Beach testified that Targee knew the Jubilees were black before he participated in the cross burning. Throughout

the O'Mara and Elliott prosecution, the Commonwealth referred to "burning a cross in a black family's yard." The questions of counsel and argument to the court are replete with references to race and racism.

Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross burning statute.

Elliott was also charged with attempted cross burning and conspiracy to commit cross burning. Upon his plea of not guilty, a jury found him guilty of attempted cross burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500.

O'Mara and Elliott appealed to the Court of Appeals, alleging that the Virginia cross burning statute violated the free speech clauses of both the United States and Virginia Constitutions. The Court of Appeals affirmed the convictions, holding that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence." *O'Mara v. Commonwealth*, 33 Va. App. 525, 536, 535 S.E.2d 175, 181 (2000).

In the third case reviewed, Barry Elton Black ("Black") organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County. Following speeches filled with racial, ethnic, and religious bigotry, a cross approximately 25 to 30 feet tall was ignited.

Black was indicted for violating Virginia's cross burning statute. He moved for dismissal of the indictment on the grounds that the statute was unconstitutional. The trial court denied Black's motion and, upon conviction by a jury, Black was sentenced to pay a fine of $2500.

Black appealed his conviction, and the Court of Appeals affirmed the judgment of the trial court, "[f]or the reasons stated in *O'Mara v. Commonwealth*." *Black v. Commonwealth*, Rec. No. 1581-99-3, December 19, 2000, at 1.

THE CROSS BURNING STATUTE

Code § 18.2-423, the cross burning statute, provides that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Black[1] contends that the cross burning statute is unconstitutional because it engages in viewpoint and

[1] Because of the similar constitutional challenges presented in these consolidated cases, our references to Black's contentions shall be inclusive of those mounted by O'Mara and Elliott.

content discrimination and it fails to incorporate the standards articulated by the United States Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), concerning incitement to, and likelihood of, imminent lawless action. Additionally, Black contends that the provision of the statute permitting an inference of intent to intimidate from the mere act of burning a cross, which excuses the Commonwealth from its proof requirement for the establishment of a prima facie case, further aggravates viewpoint and content discrimination and violates the limitations prescribed in *Brandenburg*.

The geometric configuration of a single vertical bar traversed by a single shorter horizontal bar has no unusual inherent properties. But its symbolic meaning is powerful. For Christians, the symbol of the cross evokes remembrance of the crucifixion of Christ. Unfortunately, such powerful symbols are often subject to misappropriation. As recognized by Justice Clarence Thomas in his concurring opinion in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the burning of a cross has acquired a specific meaning:

> There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning . . . . The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

In 1952, in direct response to Ku Klux Klan activities in Virginia,[2] including incidents of cross burning, the General Assembly enacted the predecessor statute to the law at issue in these cases.[3] The cross burning statute was amended on several occasions, including an amendment expanding the sites where cross burning may not take place, and the addition of the inference of intent to intimidate from the mere act of burning a cross for the purposes of establishing a prima facie case under the statute.[4]

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[2] *See Police Aid Requested by Teacher: Cross is Burned in Negro's Yard*, Richmond News Leader, Jan. 21, 1949, at 19; *Cross Fired Near Suffolk Stirs Probe: Burning Second in Past Week*, Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1; *Huge Cross is Burned on Hill Just South of Covington*, Richmond Times-Dispatch, Apr. 14, 1950, at 6; *Cross Burned at Manakin; Third in Area*, Richmond Times-Dispatch, Feb. 26, 1951, at 4; *Cross is Burned at Reedville Home*, Richmond News Leader, Apr. 14, 1951, at 1; *'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments*, Richmond Times-Dispatch, Feb. 6, 1952, at 7; *Bill to Curb KKK Passed by the House*, Richmond Times-Dispatch, Mar. 8, 1952, at 5; *Name Rider Approved by House: Measure Now Goes to Battle*, Richmond News Leader, Feb. 23, 1952, at 1; *Governor Backs Curb on Ku Klux Activities*, Richmond Times-Dispatch, Feb. 10, 1952, § 2, at 1.

[3] Code § 18.1-365 stated in pertinent part:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the Commonwealth of Virginia a burning or a flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483 § 2 at 777.

[4] *See* 1968 Va. Acts ch. 350 at 450; 1975 Va. Acts ch. 14 at 90, ch. 15 at 174.

SELECTIVE REGULATION OF SPEECH BASED UPON CONTENT

It is well established that non-verbal, symbolic expression is "speech," and is as fully protected by the First Amendment to the United States Constitution as more traditional means of communication. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing of black arm bands by high school students as a protest against the war in Vietnam). However pernicious the expression may be, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Any question about the constitutional infirmity of such selective proscription of speech was resolved by the United States Supreme Court in the case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V. R.A.V.* involved the prosecution of a teenager who, with several other minors, allegedly assembled a crudely made cross and burned the cross inside the fenced yard of a black family. *Id.* at 379. The City of St. Paul prosecuted under its Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn., Legis. Code § 292.02 (1990). The trial court held that the statute was unconstitutional, but the Minnesota Supreme Court reversed, construing the St. Paul ordinance as limited to conduct that amounts to "fighting words," namely, "conduct that itself inflicts injury or tends to incite immediate violence . . . . " *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn.1991). Accepting the limited construction placed upon the statute by the Minnesota Supreme Court, the United States Supreme Court held that, even if the expression reached by the ordinance was proscribable under the "fighting words" doctrine, the ordinance was "facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." *R.A.V.*, 505 U.S. at 381.

Noting that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed," the Court observed that "[c]ontent-based regulations are presumptively invalid." *Id.* at 382 (citations omitted). Exceptions to the rule include: obscenity (*e.g., Roth v. United States*, 354 U.S. 476 (1957)), defamation (*e.g., Beauharnais v. Illinois*, 343 U.S. 250 (1952)), and "fighting words" (*e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). But simply because particular categories of speech may be regulated does not mean that such regulation may selectively discriminate on the basis of content. As the Court in *R.A.V.* stated:

> And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the

> same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

R.A.V., 505 U.S. at 386.

The Commonwealth argues that the Virginia statute is neutral because "Code § 18.2-423 applies equally to anyone who burns a cross for the purpose of intimidating anyone." The Commonwealth further dwells upon the phrase in *R.A.V.* which states that "threats of violence are outside the First Amendment." 505 U.S. at 388. This quotation is incomplete and distorts the holding of *R.A.V.* While a statute of neutral application proscribing intimidation or threats may be permissible, a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment. *Id.*

Emphasizing the point, the Court in *R.A.V.*, noted:

> Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 384.

> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

Id. at 386.

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* – i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.

Id. at 388.

> And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.

Id.

R.A.V. makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not discriminate based upon the content of the message.[5] In

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[5] It is important to note that *R.A.V.* did not interpret the First Amendment to forbid "underinclusiveness." To the contrary, the Court held that:

> In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's

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this case, the Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message. As the Court in *R.A.V.* succinctly stated: "the government may not regulate use based upon hostility – or favoritism – towards the underlying message expressed." *Id.* at 386.

While not specifically stating that "race, color, creed, religion or gender" is the subject of proscription, the absence of such language in the Virginia statute does not mask the motivating purpose behind the statutory prohibition of cross burning. The United States Supreme Court dealt with a similar question in the "flag burning" cases. In *Texas v. Johnson*, Johnson was prosecuted under a statute making it unlawful to intentionally or knowingly desecrate the United States flag. "Desecrate" was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." 491 U.S. at 400 (quoting Texas Penal Code Ann. § 42.09 (1989)).

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prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

Id. at 387. Of course, the subjects of the proscription expressly stated in the St. Paul ordinance were symbols and words, including a burning cross or a Nazi swastika, evoking "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." As the Court noted, excluded from proscription was identical behavior with a different subject, such as "political affiliation, union membership, or homosexuality." *Id.* at 391. The infirmity addressed in *R.A.V.*, as in the cases before this Court, was not "underinclusiveness;" rather, it was the selective discrimination in the ordinance based upon content.

After the Supreme Court declared the Texas statute unconstitutional, Congress enacted the Flag Protection Act of 1989. In subsequent litigation concerning the Act, the government maintained that the absence of language in the Act focusing upon the content of the actor's symbolic speech cured any constitutional problems. The Supreme Court disagreed in *United States v. Eichman*, 496 U.S. 310, 315 (1990) (internal quotations omitted), stating that, "[a]lthough the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is related to the suppression of free expression."

Similarly, considering the historical and current context of cross burning, and the statute's reliance on such context for the provision of an inference of intent to intimidate from the mere act of burning a cross, it is clear that the Commonwealth's interest in enacting the cross burning statute is related to the suppression of free expression as well.

The virulent symbolism of cross burning has been discussed in so many judicial opinions that its subject and content as symbolic speech has been universally acknowledged. For example, the Supreme Court of South Carolina declared a statute[6] with operative language similar to ours

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[6] S. C. CODE ANN. § 16-7-120 (1985) provided:

It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the

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unconstitutional and observed: "a burning cross historically conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993). The Court of Appeals of Maryland also declared a statute[7] with operative language similar to ours unconstitutional and observed:

> Those who openly burn crosses do so fully cognizant of the controversial racial and religious messages which such acts impart. Historically, the Ku Klux Klan burned crosses to express hostility towards blacks and other groups it disfavored, and it is that idea which contemporary cross burners aim to perpetuate.

State v. Sheldon, 629 A.2d 753, 757 (Md. 1993).

The historical context for the passage of the Virginia cross burning statute is uncontrovertible. In an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech – the burning of a cross. It did not proscribe the burning of a circle or a square because no animating message is contained in such an act.

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whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

1952 Va. Acts ch. 483 § 2 at 777.

[7] MD. ANN. CODE art.27, § 10A (1957, 1992 Repl. Vol.) provided in pertinent part:

It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place.

Initially, the cross burning proscription extended only to acts on property of another without permission. In 1968, the limitation concerning situs was removed, and in 1975, the addition of language establishing prima facie evidence of intent to intimidate from the mere act of burning a cross reaffirmed the legislative context of the statute. During oral argument, the Commonwealth maintained that the portion of the statute proscribing the burning of a cross had nothing to do with the motivation of the actor. When asked how the Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning. The Commonwealth cannot have it both ways.

"SECONDARY EFFECTS"

As described above, the *R.A.V.* analysis begins with categories of speech that may be subject to regulation and holds that such regulation may not selectively discriminate on the basis of content. However, the Court in *R.A.V.* recognized that some selective regulation of constitutionally protected speech may be permissible if it is based upon the "secondary effects" of speech rather than its content. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the ordinance under review proscribed the location of an adult motion picture theater within 1,000 feet of any residential zone, single – or multiple – family dwelling, church, park, or school. Because the ordinance did not ban adult theaters entirely, the Court held that the ordinance is "properly analyzed as a form of time, place, and manner regulation." *Id.* at 46.

The analysis used by the Court focused upon whether the regulation was directed at the content of the protected speech or at a legitimate area of government concern. Determining that the dominant motive of the ordinance was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,'" the Court upheld the ordinance. *Id.* at 48. The Court held that the regulation in *Renton* was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47. By contrast, the legislative history of the Virginia cross burning statute, the meaning afforded the expressive conduct, and the provision of prima facia evidence of intent to intimidate from the mere act of burning a cross, make it abundantly clear that Code § 18.2-423 is aimed at regulating content, not "secondary effects."

OVERBREADTH ANALYSIS

As discussed herein, the majority opinion in *R.A.V.* holds that certain categories of speech may be regulated, but the government may not discriminate in its proscription within these categories on the basis of content. The concurring opinions in *R.A.V.* preferred a more traditional analysis confined to the question whether the ordinance suffered from overbreadth. As Justice White noted, St. Paul's ordinance was unconstitutionally overbroad because:

> Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial

> amount of expression that – however repugnant – is shielded by the First Amendment.

Id. at 413 (J. White, concurring). The Commonwealth's cross burning statute is similarly defective.

It is not simply the prospect of conviction under the statute that renders it overbroad. The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). Threat of prosecution under a criminal statute "tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Self-censorship, "a harm that can be realized even without an active prosecution," inhibits free speech. *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2nd Cir. 2000).

Code § 18.2-423 provides in part that "any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Assuming that the act is done "on the property of another, a highway or other public place,"[8] the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation

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[8] The Virginia statute prohibits cross-burning "on the property of another, a highway or other public place." Remarkably, it sweeps within its prohibition the act "on the property of another" with or without permission.

after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression. Code § 18.2-423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech. As such it is overbroad.

BRANDENBURG ISSUES

In *R.A.V.*, the Court acknowledged that the narrow construction placed upon the ordinance limited its application to "fighting words," a proper category of proscription. Nonetheless, the ordinance was declared unconstitutional because of its selective application to only certain expressions of fighting words. Virginia's cross burning statute suffers from the same infirmity. Because we hold that the statute impermissibly proscribes otherwise protected speech on the basis of content, and because the statute is overbroad, it is unnecessary to address the remaining challenges under *Brandenburg*.[9]

CONCLUSION

Under our system of government, people have the right to use symbols to communicate. They may patriotically wave the flag or burn it in protest; they may reverently worship the cross or burn it as an expression of

[9] Additionally, because we resolve these questions under the First Amendment to the United States Constitution, it is unnecessary to address Elliott's and O'Mara's additional argument that Article I, § 12 of the Virginia Constitution is also violated.

bigotry. Neutrally expressed statutes prohibiting vandalism, assault, and trespass may have vitality for the prosecution of particularly offensive conduct. While reasonable prohibitions upon time, place, and manner of speech, and statutes of neutral application may be enforced, government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed.

A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment. Additionally, a statute that sweeps within its ambit both protected and unprotected speech is overbroad. Accordingly, we hold that Code § 18.2-423 violates the First Amendment of the United States Constitution. The convictions in each of these appeals will be vacated and the indictments will be dismissed.

Reversed and dismissed.

JUSTICE KINSER, concurring.
JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

JUSTICE KINSER, concurring.

In the words of the dissent, I, too, "stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others." However, in contrast to the dissent, I cannot be dissuaded from that devotion, and believe that the "fair application of our jurisprudence" must include a fair and proper application of the First

Amendment. Therefore, I fully agree with the majority opinion. I write separately to address certain inferences and conclusions drawn by the dissent.

Relying on the definition of the term "intimidation" set forth in *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 670 (1985) ("intimidation ... means putting a victim in fear of bodily harm"), the dissent concludes that Code § 18.2-423 proscribes only conduct that constitutes "true threats." Expanding on that definition, the dissent then states that the purpose of Code § 18.2-423 is "to proscribe physical acts intended to inflict bodily harm upon the victims of such acts." The dissent's attempt to equate an intent to intimidate with a "true threat" or a physical act intended to inflict bodily harm has no legal basis and misconstrues the decision in *Sutton*.

The issue in that case was whether there was sufficient evidence to prove that the defendant engaged in sexual intercourse with the victim against her will by intimidation. 228 Va. at 662, 324 S.E.2d at 669. Noting that the General Assembly had expanded the scope of the statute proscribing rape to include "a prohibition against sexual intercourse with a woman against her will by threat or intimidation," as well as by force, the Court explained that "[t]here is a difference between threat and intimidation[,]" and that "[i]ntimidation may occur without threats." *Id.* at 663, 324 S.E.2d at 669-70. Thus, our established jurisprudence does not support the proposition that Code § 18.2-423 proscribes only conduct that constitutes "true threats." An act performed with the intent to intimidate, i.e., to place an individual in fear of bodily harm, does not rise to the same level as a threat (defined in *Sutton* as "expression of an intention to do bodily

harm," 228 Va. at 663, 324 S.E.2d at 670), or a physical act intended to inflict bodily harm.

For the same reason, Code § 18.2-423 does not satisfy the principle enunciated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Although reprehensible and offensive, the act of burning a cross with the intent to intimidate is not necessarily speech aimed at "producing imminent lawless action." *Id.* That proposition is borne out by the fact that the cross burning for which Barry Elton Black was convicted occurred on private property with the permission of the owner.

Even if the dissent were correct that Code § 18.2-423 proscribes only conduct that constitutes "true threats," the General Assembly cannot engage in content discrimination by selectively prohibiting only those "true threats" that convey a particular message. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Unfortunately, that is what the General Assembly has done in Code § 18.2-423 by confining the proscription in that statute to the act of burning a cross. The constitutional infirmity is not, as suggested by the dissent, cured by the fact that the statute does not prohibit all acts of burning a cross. The statute's content-based discrimination still exists.

Finally, the dissent's statement that the majority has concluded that the Constitution of the United States prevents the General Assembly from enacting a statute that prohibits persons from burning a cross "in a manner

that intentionally places citizens in fear of bodily harm" misinterprets the holding in the majority opinion. I believe that a more accurate characterization of the majority's conclusion is that the General Assembly may, in a statute of neutral application, proscribe expressive conduct performed with the intent to intimidate another individual, but that the General Assembly may not selectively prohibit only certain acts of intimidation based upon the content of the underlying message.

For these reasons, I respectfully concur.

JUSTICE HASSELL, with whom CHIEF JUSTICE CARRICO and JUSTICE KOONTZ join, dissenting.

I dissent. The majority opinion invalidates a statute that for almost 50 years has protected our citizens from being placed in fear of bodily harm by the burning of a cross. The majority concludes that the Constitution of the United States prohibits the General Assembly from enacting this statute. I find no such prohibition in either the Constitution of Virginia or the Constitution of the United States. Without question, the framers of the First Amendment never contemplated that a court would construe that Amendment so that it would permit a person to burn a cross in a manner that intentionally places citizens in fear of bodily harm.

I am concerned about the fair application of our jurisprudence to every citizen and the proper interpretation of our Federal and State Constitutions. These same concerns for fairness and the safety of our citizens were

the very basis for the General Assembly's decision to enact Code § 18.2-423 almost 50 years ago.

I stand second to none in my devotion to the First Amendment's mandate that most forms of speech are protected, irrespective of how repugnant and offensive the message uttered or conveyed may be to others. However, contrary to the view adopted by the majority in these appeals, the First Amendment does not permit a person to burn a cross in a manner that intentionally places another person in fear of bodily harm.

I.

A.

Barry Elton Black was indicted by a Carroll County grand jury for the burning of a cross with the intent to intimidate in violation of Code § 18.2-423. At the conclusion of a trial, the jury found him guilty as charged in the indictment and fixed his punishment at $2,500. Black appealed the circuit court's judgment confirming the jury's verdict to the Court of Appeals, which affirmed his conviction. *Black v. Commonwealth*, Record No. 1581-99-3 (December 19, 2000).

The following evidence was presented during Black's trial. On August 22, 1998, H. Warren Manning, the Sheriff of Carroll County, received a report that members of the Ku Klux Klan intended to conduct a rally in Carroll County that evening. Later, Sheriff Manning drove his police car to the site of the rally, where three men dressed in white robes and hats approached him. Sergeant Richard C. Clark, Jr., met Sheriff Manning at the site of the rally.

Approximately 45 minutes later, after the rally started, Sheriff Manning observed the Klan members burn a cross that was approximately 25 to 30 feet tall. Sheriff Manning approached Black and inquired, "who [is] responsible for burning the cross?" Black responded that he was responsible for burning the cross, and he was placed under arrest.

The rally was conducted on property owned by Annabell Sechrist. She was present during the rally, and she had given the Ku Klux Klan permission to burn the cross on her property.

Rebecca Sechrist, a Caucasian female, lived on property adjacent to the property where the rally occurred. Sechrist observed the rally from her home. In response to the question, "[w]hat statements did you hear?", she testified: "They . . . talked a lot about blacks – and I don't call [ ] the word they called it . . . it started with an N and I don't, I don't use that word, I'm sorry – but they talked real bad about the blacks and the Mexicans and they talked about how, one . . . guy got up and said that he would love to take a .30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and the Mexicans back from where they come from and talked about President Clinton and Hillary Clinton and about the government funding money for the, for the people that can't afford housing and stuff and . . . how their tax paying goes to keep the black people up and stuff like that."

Sechrist testified that she was "scared" as a result of the rally. She stated: "I was scared our home would get burned or something would happen to it. We've got two . . . kids and I was afraid that something would happen to

them." In response to a question by defendant's counsel, Sechrist testified: "I think they were trying to scare me."

B.

Jonathan Stephen O'Mara was indicted by a grand jury in the City of Virginia Beach for attempting to burn a cross with the intent of intimidating a person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. O'Mara entered a guilty plea that reserved his right to file an appeal challenging the constitutionality of Code § 18.2-423.

The court fixed O'Mara's punishment at incarceration in the jail for a term of 90 days and imposed a fine of $2,500 on each of the charges. O'Mara appealed the judgment to the Court of Appeals, which affirmed his convictions. *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S.E.2d 175 (2000).

O'Mara entered into a stipulation of facts with the Commonwealth, which was made a part of the record in the circuit court. The stipulation states: "On May 2, 1998, David Targee had approximately fifteen individuals, including Jonathan O'Mara and Richard Elliott, at his residence in Virginia Beach. They were all consuming alcohol. Elliott complained to Targee and O'Mara about his neighbor and about how he wanted to 'get back' at him. It was suggested (not by O'Mara) that they burn a cross in Elliott's neighbor's yard. O'Mara and Targee agreed, and they all went to Targee's garage where a cross was built. They all got in Targee's truck and drove to Munden Point Road in Virginia Beach. Targee was driving, with O'Mara in the front passenger seat and Elliott in the back seat.

Once there, Elliott handed the cross to O'Mara, who also grabbed a can of lighter fluid and went outside and placed the cross in the yard of Elliott's neighbor. He then poured lighter fluid on the cross, set it on fire, and ran back to the car. Targee drove them back to his house. The next morning, Elliott's neighbor, James Jubilee, came out of his house and observed the partially burned cross in his yard. He broke the cross and placed [it] in the garage. He later called the police."

C.

A grand jury in the City of Virginia Beach indicted Richard J. Elliott for attempting to burn a cross on the property of James S. Jubilee with the intent of intimidating any person or group of persons in violation of Code § 18.2-423 and conspiracy to burn a cross in violation of Code § 18.2-423. At the conclusion of a trial, the jury found Elliott guilty of attempted cross burning with the intent to intimidate and fixed his punishment at 90 days incarceration in jail and a fine of $2,500. Elliott appealed the circuit court's judgment to the Court of Appeals, which affirmed his conviction. *See O'Mara*, 33 Va. App. 525, 535 S.E.2d 175.

The following evidence was adduced at the trial. James Jubilee resided at 2044 Munden Point Road in Virginia Beach. One day, Mr. Jubilee told his next door neighbor, Mrs. Elliott, that he was concerned because persons were discharging firearms in her backyard. Mrs. Elliott responded that her husband maintained a firing range in the rear of her yard.

On May 2, 1998, David Targee had a party at his home where he entertained Jonathan O'Mara, Richard

Elliott, and others. Richard Elliott, who had consumed alcoholic beverages, mentioned that "his neighbors were complaining about him shooting in his backyard. . . . He wanted to get back at them for doing it."

Later that evening, Targee, Elliott, and O'Mara went to Targee's parents' garage and constructed a wooden cross. After they had constructed the cross, they traveled by car to Mr. Jubilee's home where O'Mara placed the cross in the yard and ignited it. The next morning between 8:15 and 8:30, Mr. Jubilee saw the cross, which contained "burn spots." He picked it up and broke it.

Jennifer Luning, O'Mara's former "girlfriend," testified that O'Mara admitted that he, Targee, and Richard Elliott had burned the cross. "He had said that before they actually went out and did it that there was a conversation taking place about Richard had been complaining or the neighbors had been complaining about shooting [guns] in the backyard."

Edwin Coyner, a fire investigator for the City of Virginia Beach, testified that he interviewed Targee several times. Targee informed Coyner that "Richard Elliott had complained about his neighbors because the neighbors had complained about him shooting in the backyard."

II.

A.

The First Amendment of the Constitution of the United States provides in part: "Congress shall make no law . . . abridging the freedom of speech." Article I, § 12 of the Constitution of Virginia states:

> "That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

The Fourteenth Amendment prohibits state action in violation of the First Amendment. The freedom of speech guaranteed by Article I, § 12 of the Constitution of Virginia is co-extensive with the protections guaranteed by the First Amendment of the Constitution of the United States.

Code § 18.2-423 states:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

B.

We have held, since the birth of this Commonwealth, that "the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter

of the Constitution, or the fundamental principles thereof." *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 40 (1793). However, clearly engrained within our jurisprudence is the principle that this Court

> "can declare an act of the general assembly void *only* when such act *clearly and plainly* violates the [C]onstitution, and in such manner as to leave no doubt or hesitation on our minds.
>
> "This rule has been repeatedly declared by this court.
>
> . . . .
>
> The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between the people and their immediate representatives."

Commonwealth v. Moore, 66 Va. (25 Gratt.) 951, 953 (1875). Indeed, we have repeatedly held that "[e]very act of the legislature is presumed to be constitutional, and the courts are powerless to declare an act invalid, except where it appears beyond doubt that it contravenes some provision of the State or Federal Constitution. If we doubt we must sustain its constitutionality." *Tobacco Growers' Co-Operative Assoc. v. Danville Warehouse Co.*, 144 Va. 456, 469, 132 S.E. 482, 486 (1926). We restated this fundamental principle in *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959):

> "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are presumed to be constitutional and this presumption

> is one of the strongest known to the law. As we said in *Almond v. Day*, 199 Va. 1, 6, 97 S.E.2d 824[, 828 (1957)]: ' . . . It is only where an act is plainly repugnant to some constitutional provision that the courts can declare it null and void. If there be a reasonable doubt whether the act violates the fundamental law, that doubt must be resolved in favor of the act.'"

Accord Jefferson Green Unit Owners Asso , Inc. v. Gwinn, 262 Va. 449, 459, 551 S.E.2d 339, 344 (2001); *Motley v. Virginia State Bar*, 260 Va. 243, 247, 536 S.E.2d 97, 99 (2000); *Finn v. Virginia Retirement System*, 259 Va. 144, 153, 524 S.E.2d 125, 130 (2000); *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 9, 509 S.E.2d 307, 311 (1999); *Mumpower v. Housing Authority*, 176 Va. 426, 443, 11 S.E.2d 732, 738 (1940); *Antoni v. Wright*, 63 Va. (22 Gratt.) 833, 882 (1872); *Auditor of Public Accounts v. Graham*, 5 Va. (1 Call) 475, 476 (1798). For some inexplicable reason, the majority ignores this fundamental principle.

C.

Black, O'Mara, and Elliott (the defendants), relying principally upon *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), argue that Code § 18.2-423 violates their right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States and Article I, § 12 of the Constitution of Virginia and that the Court of Appeals erred by holding that the statute comported with these constitutional provisions. I disagree with the defendants.

Initially, I observe that Code § 18.2-423, by its express terms, does not proscribe every act of burning a cross. Rather, Code § 18.2-423 only proscribes the act of burning a cross when such act is performed "with the intent of

intimidating any person or group of persons" and the act is committed "on the property of another, a highway or other public place." In the context of our criminal statutes, specifically Code § 18.2-61, we have defined intimidation as acts which put the victim "in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria." *Sutton v. Commonwealth*, 228 Va. 654, 663, 324 S.E.2d 665, 669 (1985).

Thus, applying the clear and unambiguous language in Code § 18.2-423 in conjunction with our established definition of intimidation, which the majority ignores, I conclude that Code § 18.2-423 only proscribes conduct which constitutes "true threats." And, I note that the United States Supreme Court, in *Watts v. United States*, 394 U.S. 705, 707 (1969), approved the facial constitutionality of a federal criminal statute that prohibited someone from threatening the life of the President of the United States. It is well established that true threats of violence can be proscribed by statute without infringing upon the First Amendment. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Nat'l Organization for Women, Inc. v. Scheidler*, ___ F.3d ___, ___ (7th Cir. 2001); *Bauer v. Sampson*, 261 F.3d 775, 782 (9th Cir. 2001); *United States v. Rahman*, 189 F.3d 88, 115 (2nd Cir.), *cert. denied*, sub nom. *Nosair v. United States*, 528 U.S. 982 (1999); *United States v. Francis*, 164 F.3d 120, 122-23 (2nd Cir. 1999); *United States v. J.H.H.*, 22 F.3d 821, 825 (8th Cir. 1994). However, I must continue this inquiry regarding the constitutionality of Code § 18.2-423 because in *R.A.V., supra*, the Supreme Court held that the First Amendment

imposes certain limitations upon the regulation of speech and expressive conduct, including true threats.

In *R.A.V.*, the Supreme Court considered whether an ordinance was facially invalid under the First Amendment. In *R.A.V.*, the defendant, along with several other teenagers, made a wooden cross and burned it in a yard owned by a black family. The defendant was convicted of violating the following ordinance:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Supreme Court held that the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the content of the speech, even though the Minnesota Supreme Court had concluded that the ordinance only prohibited unprotected "fighting words." *R.A.V.*, 505 U.S. at 379-81.

The Supreme Court observed, however, that certain "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination

of proscribing *only* libel critical of the government." *Id.* at 383-84.

The Supreme Court explained:

> "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience – i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707 (1969). . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example . . . a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud . . . is in its view greater there. . . . But a State

> may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

R.A.V., 505 U.S. at 388-89.

The Supreme Court also articulated a second basis which would permit some degree of content-based discrimination.

> "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). . . . A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech, but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.
>
> "These bases for distinction refute the proposition that the selectivity of the restriction is 'even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say."' *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555 (1981). . . . There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular

> 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. . . . Save for that limitation, the regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."

R.A.V., 505 U.S. at 389-90.

In invalidating the City of St. Paul's ordinance, the Supreme Court stated that

> "[a]lthough the phrase in the ordinance 'arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."

Id. at 391.

Continuing, the Supreme Court explained:

> "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred and, in particular, as applied to this case, messages 'based on virulent notions of racial supremacy.'"

Id. at 392 (citation omitted).

Contrary to the majority's opinion, Code § 18.2-423 does not suffer from the defects contained in the ordinance at issue in *R.A.V.* As previously stated, Code § 18.2-423 does not prohibit every act of burning of a cross. Rather, the statute only prohibits the burning of a cross when such act is performed with the intent to intimidate. And, consistent with our jurisprudence, the word "intimidate" means to place one in fear of bodily harm. Unlike the City of St. Paul's ordinance, which targeted cross burning on the basis of race, color, creed, religion or gender, Code § 18.2-423 does not contain those limitations. The conduct proscribed in the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate. That point is best illustrated in *O'Mara* and *Elliott* because these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliotts' yard, not because of any racial animus.

Additionally, the Supreme Court pointed out in *R.A.V.* that a valid basis for according differential treatment even to a content-defined subclass of proscribable speech is

when the subclass happens to be associated with particular secondary effects of the speech so that the regulation is justified without reference to the content of the speech. The ordinance that the Supreme Court invalidated in *R.A.V.* targeted any cross burning that "one knows or has reasonable grounds to know arouses anger, alarm or resentment." 505 U.S. at 380.

By contrast, from its clear and unambiguous language, the purpose of the Virginia statute, Code § 18.2-423, is not to suppress repugnant ideas, but rather to proscribe physical acts intended to inflict bodily harm upon the victims of such acts. Simply stated, the Virginia statute proscribes acts of intimidation, but it does not prohibit persons from expressing their views, irrespective of how repugnant or offensive those views may be to others. The Virginia statute does not prohibit the burning of a cross so long as that act is committed without an intent to place a person in fear of bodily harm. *See also In re Steven S.*, 31 Cal. Rptr. 2d 644, 646, 647-48 (Cal. Ct. App. 1994) (statute proscribing the act of "burn[ing] a cross on the private property of another for the purpose of terrorizing the owner or occupant or in reckless disregard of that risk" is not impermissible content-based prohibition on speech within the meaning of the First Amendment); *State v. Talley*, 858 P.2d 217, 220, 225-27 (Wash. 1993) (statute proscribing cross burning that places another person in reasonable fear of harm to his person or property does not violate the First Amendment).

I recognize that the Supreme Court of South Carolina, in *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), invalidated a statute that prohibited the burning of a cross on the basis that it contravened the First Amendment. The South Carolina statute, however, was significantly different from

the Virginia statute. The South Carolina statute stated: "It shall be unlawful for any person to place or cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part . . . without first obtaining written permission of the owner or occupier of the premises so to do." *Id.* at 514.

Unlike Code § 18.2-423, which proscribes the burning of a cross with the intent of intimidating and, thus, prohibits real threats, the South Carolina statute contained no similar limitation. The Supreme Court of South Carolina concluded that its statute was enacted "in order to protect individuals and society as a whole from the reprehensible messages often sought to be symbolicly [sic] expressed by a burning cross." *Ramsey*, 430 S.E.2d at 514. As I have already explained, Virginia's statute does not suffer from this constitutional defect. Thus, the differences between the Virginia statute and the South Carolina statute are real and significant. Yet, the majority ignores the differences between Code § 18.2-423 and the South Carolina statute.

I also observe that the Maryland Court of Appeals, in *State v. Sheldon*, 629 A.2d 753, 755 (Md. 1993), held that a Maryland statute violated the First Amendment because it required those who wished to burn crosses or religious symbols to "secure the permission of the property owner where the burning is to occur and [to] notify the local fire department before engaging in the burning." That statute stated in part:

> "It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place."

Id. at 755. Unlike the Virginia statute, the Maryland statute did not proscribe burning a cross with the intent of intimidating, but rather, is content-based regulation of expression. The Maryland Supreme Court found "no way to justify the cross burning statute without referring to the substance of speech it regulates, because the statute does not protect property owners or the community from unwanted fires any more than the law already protected those groups before the statute's enactment." *Id.* at 755. Yet, the majority ignores these significant distinctions.

III.

Defendant Black argues that Code § 18.2-423 "does not incorporate the requirements that the speech at issue be directed to the incitement of imminent lawless action, and likely to produce such action, and as such is unconstitutional under the standard of *Brandenburg v. Ohio*, and the *Brandenburg* standard was not satisfied here." I disagree with the defendant. The Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) simply has no application here.

The Supreme Court considered the following facts in *Brandenburg*. Brandenburg, "a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any

society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'" *Id.* at 444-45 (alteration in original).

Brandenburg placed a telephone call to a reporter on the staff of a television station and invited the reporter to attend a Ku Klux Klan rally that would be held at a certain farm. "[T]he reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network." *Id.* at 445. The prosecutor relied upon the films and testimony identifying the defendant as the person who communicated with the reporter and who spoke at the rally. The prosecutor "also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films." The only persons present at the rally other than the participants were the newsmen who made the film. *Id.* at 445-46.

The Supreme Court pointed out that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Continuing, the U.S. Supreme Court stated that

> "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech

> which our Constitution has immunized from governmental control."

Id. at 448.

The Supreme Court invalidated the Ohio Criminal Syndicalism Act because neither the indictment nor the trial court's instructions to the jury "refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448-49.

In stark contrast to the Supreme Court's decision in *Brandenburg*, we are not concerned here with abstract teaching regarding the moral propriety or even moral necessity of violence as a means for accomplishing political reform. Rather, the subject of this case is Code § 18.2-423, a statute which proscribes the burning of a cross with the intent to intimidate, which we have held means to place the victim in fear of bodily harm. And, I note that the jury at defendant Black's trial was specifically instructed that

> "[i]ntimidate, as used in the term 'with the intent to intimidate' means a motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria."

I have already observed, in response to defendant's counsel's questions at trial, Rebecca Sechrist testified that she was afraid that her "home would get burned or something would happen to it." Moreover, defendant Black has never challenged the sufficiency of the evidence to support

the jury's finding beyond a reasonable doubt that his acts placed Sechrist in fear of bodily harm.

IV.

Defendant Black argues that "[t]he provision of Code § 18.2-423 providing that the burning of a cross shall be *prima facie* evidence of an intent to intimidate permits a jury to find intimidation from the mere act of cross-burning alone, in contravention of the First Amendment." I disagree.

Code § 18.2-423 creates a statutory inference, and we have stated that an "inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best." *Martin v. Phillips*, 235 Va. 523, 526 n.1, 369 S.E.2d 397, 399 n.1 (1988). Additionally, "inferences are never allowed to stand against ascertained and established facts." *Ragland v. Rutledge*, 234 Va. 216, 219, 361 S.E.2d 133, 135 (1987) (citing *Southern Ry. v. Mays*, 192 Va. 68, 76, 63 S.E.2d 720, 725, *cert. denied*, 342 U.S. 836 (1951)).

This statutory inference is a factor that the jury may accept or reject in determining whether a defendant burned a cross with the intent to intimidate a victim. This inference alone, however, is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate. And, this statutory inference does not, and cannot, absolve the Commonwealth of its burden to prove each element of Code § 18.2-423 beyond a reasonable doubt.

Moreover, the jury in Black's trial was specifically instructed as follows:

"INSTRUCTION NO. 6

"THE COURT INSTRUCTS THE JURY THAT:

> "The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged. It is not sufficient that the jury believe the defendant's guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction. The evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and the defense and unless you believe that the guilt of Barry Elton Black has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find him not guilty."

. . . .

"INSTRUCTION NO. 8

"THE COURT INSTRUCTS THE JURY THAT:

> "The defendant is charged with the crime of placing a burning cross in a public place with the intent to intimidate. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

"(1) That the defendant burned or caused to be burned a cross in a public place; and

"(2) That he did so with the intent to intimidate any person or group of persons.

"If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

"If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty."

As these jury instructions indicate, the Commonwealth was required to prove each and every element of its case, including the requirement of intimidation, beyond a reasonable doubt.

V.

For the foregoing reasons, I would affirm the judgments of the Court of Appeals.

Richmond News Leader, Jan. 21, 1949, at 19

Police Aid Requested By Teacher

Cross is Burned In Negro's Yard

A Negro school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police today after the burning of a cross in his front yard last night.

At Second District, officer said patrolmen on the beat in which the residence is situated have been instructed to pay special attention to activities in that block, particularly during the day when both the complainant and his wife are in school.

The incident happened at about 8:30 o'clock last night in the yard of 2700 Barton Ave., now owned by J. M. Sweat, a teacher at George Mason School.

TOLD BY NEIGHBOR

Sweat said he and his wife were in the upstairs rooms listening to the radio and knew nothing of what was happening until a neighbor rang their doorbell and told them.

The burning cross, about five feet high, was covered with burlap bags soaked in oil. Witnesses said it had burned about 10 minutes before Sweat extinguished the flames by pouring water on them.

The householder, aided by police, removed the cross to the rear yard.

A small crowd had gathered and was watching the burning when Sweat emerged from the house and disposed of the flaming cross.

The Sweat family had moved into the house several weeks ago, but said this was the first trouble they have had. While all the other homes in the 2700 block now are occupied by whites, several of them have been purchased by Negroes, who expect to occupy them soon.

Mrs. Sweat, a student at Virginia Union University, said today she did not "have the slightest idea" who could have been responsible for the act, and added that she was somewhat puzzled by its significance.

"I knew such things happened during the last century," she said, "but I didn't know there were any Ku Klux Klanners in Richmond now. It looks like a KKK act."

Richmond Times-Dispatch, Jan. 23, 1949, § 2, at 1

Cross Fired Near Suffolk Stirs Probe

Burning Second in Past Week

Virginia's second cross-burning episode of the week was under investigation yesterday by Nansemond County law enforcement officers.

A six-foot wooden cross was burned Friday night in front of a store at Driver, owned by Alvester Drake, a Negro.

The incident followed by less than 24 hours, the burning of a cross on the front lawn of J. M. Sweat, a Negro schoolteacher living in a predominantly white residential section of Richmond.

J. Frank Culpepper, Nansemond County sheriff said "only a few persons" apparently set up and lit the cross near Drake's store. He said none of the participants were hooded or masked, and that there was no ceremony.

Culpepper said the cross-burners arrived at the store in two automobiles and left immediately after setting the flames.

Two Different Groups

He could ascribe no reason for the incident. But he said he believed the participants were not the same group which last December 11 burned a cross on the property of County Fire Warden N. H. Bradshaw. All of the members of that group, he pointed out, were hooded and masked, and there was a ceremony attendant upon the burning.

Meantime, Richmond police continued an investigation into the burning of a five-foot cross in the Sweat front yard. Police Chief O. D. Garton said Saturday his department was sparing no effort "to apprehend the guilty parties."

If found, he said the participants could be charged with violating city fire ordinances, trespassing and disturbing the peace.

Sweat was not at home when the cross-burning occurred in the North Side community of Barton Heights. Police extinguished the fire after the cross had been burning about 10 minutes.

Sweat said he "had no idea who was responsible."

The cross burnings at Driver and Richmond brought to eight the number which have occurred in Virginia

during the past year. Six of the incidents have occurred in Nansemond County.

Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents.

Some sources have expressed the opinion that the cross burnings, especially the Whaleyville affair, were Ku Klux Klan activities.

But in Atlanta, KKK Grand Dragon Samuel Green said yesterday that the Klan "played no part" in the incidents and had no member groups in Virginia.

"Un-American Act"

The latest Richmond cross burning was denounced last night by W.H. Reavis, treasurer of the Progressive party of Richmond, as "an un-American act, designed to intimidate Negroes from seeking their rights as citizens."

"The Klan elements who participated in and inspired this terroristic act fear the growing movement of the Negro people for their full constitutional rights and for an end to the un-American practices of discrimination and segregation," Reavis' statement said.

It added that "the Klan and Klan-minded groups are frightened at the increased political activity of the Negroes in Richmond, together with labor and other white progressives."

The first Richmond cross burning occurred on March 23 of last year on the lawn of the Robert Fulton School.

Onlookers in the vicinity reported seeing persons clad in sheets running back and forth behind the burning cross during the 20 minutes that it was afire early that night.

Police said school property was not damaged, and they could give no reason for the affair.

No one was on the school property when the officers arrived. Police later said they thought the cross burning was a prank.

Meanwhile, Alice Burke, State chairman of the Virginia Communist party, issued this statement here last night:

"Our city was immeasurably harmed when a cross was burned on the lawn of one of Richmond's citizens." (She referred to the most recent incident).

Richmond Times-Dispatch, Apr. 14, 1950, at 6.

Huge Cross Is Burned on Hill Just South of Covington

Special to the Times-Dispatch

COVINGTON, VA., April 13 – a huge cross reminiscent of the Ku Klux Klan days, was burned atop a hill just south of Covington late last night.

Hugh D. Little of Suffolk one of nine men questioned by Sheriff W. E. Henderson, assumed responsibility for the burning the sheriff said, and explained that the cross was a part of an initiation ceremony of the Knights of the Kavaliers, a secret organization charted by the State Corporation Commission in 1948.

Sheriff Henderson said Little exhibited the charter of the organization, showing himself, John R. Hampton, of Suffolk; Ralph E. Hampton of Suffolk; and James T. Lewis, of Norfolk, as the organizers.

There was no show of violence in connection with the cross-burning. Sheriff Henderson said. He added that Little gave him a signed statement in which he admitted full responsibility for the act.

Henderson said he investigated the incident on the strength of an anonymous telephone call and intercepted nine men in four cars about 500 yards from the burned cross. Little and John R. Hampton were in the first of the four cars, he said, and readily admitted their identities.

The men in the other three cars, Henderson said, were believed to be local citizens but he was unable to identify them. They would not discuss the matter, leaving Little to do the talking, he added.

After questioning the men on the road, Henderson said he went to the scene and found the charred cross lying on the ground partially covered with dirt but still burning. He extinguished the flames and took the cross to his office.

The sheriff said the cross was constructed of sawed lumber two by five inches. The cross-bar, he said, was about six feet long and the upright bar about 12 feet long.

A similar cross-burning took place near Covington July 2 of last year, but the scene of that incident was on the opposite side of town from the burning last night.

Investigation Planned

SUFFOLK, April 13, – The Nansemond Commonwealth's Attorney Paul L. Everett said today his office plans to investigate a cross burning at Driver last night to see if there had been any violation of the law. Deputy Sheriff, C. F. Mansey described the cross as 18 feet high and eight feet wide.

Richmond Times – Dispatch, Feb. 26, 1951, at 4

Cross Burned At Manakin; Third in Area

Men Flee Negro Home In Auto, Firing Pistol

MANAKIN, VA. Feb. 25 – A six-foot cross was burned in front of the home of a Negro family in the center of this small Goochland community shortly before 10 o'clock Saturday night.

It was the third such cross to be burned in this vicinity within the past week, authorities said. Two of the crosses were burned in Goochland County and the third in the western section of Henrico County.

In all three cases, the crosses were burned in front of the homes of Negro tavern owners. Law enforcement authorities were unable to give any reason for the burnings.

The latest cross was burned in front of the home of John B. Pittman, owner of a small tavern on State Route 6, about 11 miles west of Richmond and 10 miles east of Goochland Courthouse.

Five Shots Fired

Pittman said he heard a commotion in front of his home Saturday night. When he went to the front door, the cross was blazing. He said five or six white men were running away. They jumped into an automobile parked near by and drove away in the direction of Goochland Courthouse, he said.

Pittman said one of the men stuck a pistol out of a window of the automobile and fired five times.

"I can think of no reason why tehy [sic] picked out me to burn a cross," Pittman said. "I have run a business in the county for years and have no enemies as far as I know."

Deputy Sheriff John Amos said a similar cross was burned Saturday, February 17, in front of Ida Mickie's home on Maidens Road, several miles from the Pittman residence.

There had been a fight at the Mickie Tavern the night before and several persons had been arrested, Amos said. "We thought it was some of those arrested trying to get revenge on the woman but with the burning last night it puts a different light on the matter," he said.

Pranksters Suspected

Amos said no one saw the cross being placed at the Mickie place. Several shots were fired as the automobile drove away.

The crosses were about six feet high and made out of small strips of wood like bean holders; Amos said. The

crosses were wrapped in burlap bagging, which had been soaked in oil.

Goochland County Sheriff Joe Powers said last night he and Amos were working on the two cases. He said it was his opinion that the crosses were the work of "bad boys" in the county and they were "acts of vandalism."

Commonwealth's Attorney J. C. Knibb was out of the county for the weekend.

White persons living in the vicinity were questioned by a reporter, but none could give any information as to why the crosses had been burned.

In the Henrico County case, the cross was burned in front of the Broadway Inn, a Negro tavern on Broad Street Road about five miles west of Richmond, also on Saturday night, February 17.

Henrico County Policeman R. H. Beck, who investigated the complaint said he thought it was the work of pranksters. He listed "vandalism" on his report.

Henrico County Police Chief Wilmer Hedrick said last night he had thought the cross burned in his county was an act of vandalism. However, he said in view of the other two burnings, he planned to confer with Goochland authorities for further investigation.

Commonwealth's Attorney H. M. Ratcliffe said last night he had not heard of the burning but that he would take action if the persons responsible were caught.

Richmond News Leader, Apr. 14, 1951, at 1

Cross Is Burned At Reedville Home

Special to The News Leader

REEDVILLE, April 14 – A cross was burned here last night in front of the home of R. L. Walker, local fish net repairman.

The family said today they suspected the cross burning was the result of the family's prosecution of five juveniles recently. The youths were punished Thursday in Juvenile Court for shooting firecrackers at the Walker's home, Walker's daughter said.

Investigation of the cross-burning is being conducted by the Northumberland County sheriff.

Richmond Times-Dispatch, Feb. 6, 1952, at 7

'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments

Governor Battle said yesterday that Virginia "might well consider passing legislation" to restrict the activities of the Ku Klux Klan.

He took his cue from the reports that the Klan, long considered dead in Virginia, is being revitalized in Richmond. A prominent Southern Ku-Kluxer has confirmed a report that attempts are being made to establish a klavern in Richmond.

[In the hooded organization, a klavern is the name given to local Ku Klux Klan clubs.]

Asked for a comment on the report that the Klan is to be revived in Virginia, the Governor said: "My reaction is not very happy."

He said that he did not know of any Virginia statutes which prohibit the wearing of masks in public and added, "If the Klan, as presently constituted, is coming to Virginia, we might very well consider passing such legislation."

By "such legislation" the Governor meant a law similar to those passed by other States where the Klan has been reactivated.

Meanwhile, Dr. J. M. Tinsley, local president of the National Association for the Advancement of Colored People, said he would call on the Federal Bureau of Investigation today to take immediate action.

Yesterday, FBI officials here said they had no word from Dr. Tinsley or other NAACP officials and declined to comment on the Klan.

"There is nothing more important than the FBI should devote its activities to at this time in Virginia than to apprehend and expose the people who are organizing and joining the Ku Klux Klan," Dr. Tinsley said.

Bill Hendrix, of Tallahassee, Fla., grand dragon of one division of the Klan, confirmed a report Monday that he was in Richmond "a couple of weeks ago" and plans a return visit "the first Saturday in March." He refused to identify his Richmond contacts and where the meeting will be held when he makes a return visit.

Foster on Guard

Richmond's safety director, Richard R. Foster, said he had heard nothing on the reactivation of the Klan, but "will keep a close watch on it." He added that he would have to wait for further developments.

In Leesville, S. C., Thomas L. Hamilton, grand dragon of the Carolinas Ku Klux Klan said yesterday he has been chosen imperial wizard of the klans in the Eastern United States.

During a telephone interview with The Times-Dispatch, Hendrix said that most of Ku Klux Klan recruiting spade work in Virginia was being done by his ally, Hamilton. Hendrix admitted that he has not been too active in the Klan's organization work of late.

Advancement "News"

Hamilton's advancement in rank, however, was "news" to an Atlanta spokesman for Klan organizations claiming to cover "the 48 States." "I hadn't heard about it," Charles H. Klein, executive secretary of the Association of Georgia Klans and the Associated Klans of America, reported.

"He must be worried," Klein added. "He must need publicity."

Hamilton and Grand Dragon Bill Hendrix, of the Florida Klan, have been working together for some time, according to the Associated Press, but both have been at outs with the Georgia Klan.

Hamilton's new post is comparable to that held by the late Sam Green, of Atlanta, after whose death the Klan

split up into State and factional groups. Before the Atlantan's death, Hamilton was a constant companion to Green.

Richmond Times-Dispatch, Feb. 10, 1952, § 2 at 1

Governor Backs Curb On Ku Klux Activities

Battle Confirms Experts Working To Draw Up Bill

By James Latimer

A bill aimed at unmasking any Ku Kluxers who try to raise their sheeted heads in Virginia may be added to Governor Battle's legislative program in the next few days.

The Governor yesterday confirmed a report that he had set legislative drafting experts to work on the problem of what legislation might be devised to checkmate the Klan.

Earlier last week a Florida KKK "grand dragon," Bill Hendrix, of Tallahassee, said a "klavern" is being formed in Richmond – a "klavern" being Ku Kluxese for local chapter or unit of the hooded hoodlums.

Governor Battle's legislative researchers are delving first into existing Virginia laws to see what statutes might already be on the books for use in controlling the Klan. None had been found yesterday, and it appeared a new law would be needed.

Antimasking Law

Any such legislation probably will take the form of antimasking laws which some other States have adopted.

The Governor told reporters the State couldn't ban secret organizations as such, but "we can condemn organizations in which people are ashamed to permit their faces to be shown and their membership to be known."

Apart from the Richmond klavern-forming, there have been unconfirmed reports the Kluxers are trying to organize elsewhere in the Old Dominion.

* * *

Richmond News Leader, Feb. 23, 1952, at 1

Name Rider Approved By House

* * *

2. The Senate approved and sent to the House the Stephens anti-Ku Klux Klan bill. Designed to outlaw masks worn in public, the bill was amended before passage to ban the burning of crosses and other similar evidences of terrorism.

* * *

Richmond Times-Dispatch, Mar. 8, 1952, at 5

Bill to Curb KKK Passed By the House

Action Is Taken Without Debate

The Senate bill to curb activities of the Ku Klux Klan in Virginia was passed yesterday without debate in the House of Delegates.

The bill now goes to Governor Battle. He recommended the measure offered by Senator A. E. S. Stephens, of Smithfield.

The bill would prohibit the wearing of masks and the burning of crosses on public property, and on private property without the consent of the owner or occupant.

Delegate John B. Boatwright, of Buckingham County, was the lone dissenter in the House. The bill was presented to the House by a former FBI agent, Delegate Mills E. Godwin, of Suffolk.

Recently, a KKK official predicted an effort would be made to organize klaverns in Virginia. The official said the first effort would come this Spring in the Richmond area.

"Very Salutary Effect"

Godwin said law and order in the State were impossible if organized groups could create fear by intimidation. He predicted the bill would have "a very salutary effect" by giving the police a method to control "activities that tend to incite resentment."

"This bill is distinctively in the public interest, and I urge the House to pass it," the Suffolk Delegate said.

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(6)

No. 01-1107

Supreme Court, U.S.
FILED
AUG 9 2002

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

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60 pp

QUESTION PRESENTED

Does the Virginia statute that bans cross burning with intent to intimidate violate the First Amendment, even though the statute reaches *all* such intimidation and is not limited to any racial, religious or other content-focused category?

LIST OF PARTIES

The petitioner is the Commonwealth of Virginia. The respondents are Barry Elton Black, Richard J. Elliott and Jonathan O'Mara, each of whom was convicted under Virginia Code § 18.2-423, which prohibits cross burning with intent to intimidate.

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BRIEF OF PETITIONER

The Commonwealth of Virginia respectfully petitions this Court to reverse the judgment of the Supreme Court of Virginia, which held that the First Amendment is violated by the Virginia statute prohibiting cross burning with "the intent of intimidating any person."

OPINIONS BELOW

The Supreme Court of Virginia held that Virginia Code § 18.2-423 – which bans cross burning with the intent to intimidate – is unconstitutional and thus reversed the convictions of the three respondents. This decision is published as *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001), and is reprinted in the Joint Appendix at J.A. 269. The opinion of the Court of Appeals of Virginia, affirming the convictions of two respondents, Jonathan O'Mara and Richard J. Elliott, is published as *O'Mara v. Commonwealth*, 535 S.E.2d 175 (Va. App. 2000). It is reprinted at J.A. 258. The unpublished *per curiam* order of the Court of Appeals of Virginia, affirming the conviction of the third respondent, Barry Elton Black, is reprinted at J.A. 201. The letter opinion of the Circuit Court of Carroll County, overruling Black's motion to dismiss the indictment is reprinted at J.A. 7. The ruling whereby the Circuit Court of the City of Virginia Beach overruled Elliott's and O'Mara's motions to dismiss their indictments is reprinted at J.A. 222, 224.

JURISDICTION

The decision of the Virginia Supreme Court was entered on November 2, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. A writ of certiorari was granted on May 28, 2002.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Virginia Code § 18.2-423 states:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

STATEMENT OF CASE

For a half-century, the Commonwealth of Virginia has banned the fear-inspiring practice of cross burning.

Enacted in 1952, the statute at issue – Virginia Code § 18.2-423 – was a well-advised response to domestic terrorism by the Ku Klux Klan.[1] Yet, the statute is not limited to that group, nor to those whose acts of intimidation spring from similar racial or religious bigotry. Instead, the statute bans cross burning by *anyone* whose intent is to intimidate *anyone* for *any reason*.

The case at bar involves a consolidated appeal arising out of three separate convictions for violations of the cross burning statute. Two co-defendants were convicted for a 1998 act of cross burning in Virginia Beach. The third conviction followed a separate cross burning incident in 1998 in Carroll County, part of rural southwestern Virginia. The facts of each case are as follows:

Virginia Beach – May 2, 1998: There is no evidence that these two respondents – Richard J. Elliott and Jonathan O'Mara – are members of the Klan or any similar group. The record does not show that they hold any particular views on politics or race or any other subject. They tried to burn a cross in the yard of Elliott's next door neighbor, James S. Jubilee, simply because they wanted to "get back" at Jubilee by intimidating him and his family.

A native Virginian and African-American, Jubilee had recently moved back to the Commonwealth from California, along with his wife and two sons. J.A. 226. The family

[1] The Virginia Supreme Court took notice of the public history of the times in which the cross burning statute was originally enacted, citing a series of nine newspaper articles appearing between 1949 and 1952. *Black*, 553 S.E.2d at 742 n.2, J.A. 274 n.2. Copies of these articles are reproduced at J.A. 312-26.

had lived in their new neighborhood for about four months when, on May 2, 1998, Jubilee asked Elliott's mother about "some shooting" that was going on behind the Elliott home. She explained that her son had a firing range where he shot firearms as a hobby. *Id.* at 228. The conversation was cordial. *Id.* at 228. Even so, Jubilee's inquiry so angered Elliott and O'Mara that – after drinking a lot of beer – they hatched a plan to burn a cross that night in Jubilee's yard. They were joined in this endeavor by a seventeen year-old friend, David Targee.

Late that night, the three of them rode onto Jubilee's land in a pick-up truck, planted their makeshift cross, set it afire and fled. Jubilee awoke the next morning – a Sunday – to find the partially burned cross stuck in the ground less than 20 feet from his house. *Id.* at 229-30. Initially furious, Jubilee soon became worried and very nervous. He was concerned about what might come next, and saw the burnt cross as "just the first round." *Id.* at 231. Jubilee called the police.

After an investigation, Elliott and O'Mara were identified as perpetrators. They were both indicted for attempting to burn a cross with intent to intimidate, in violation of Va. Code § 18.2-423.[2] Before trial, both defendants moved to dismiss the indictments claiming that the cross burning statute is unconstitutional. The trial court denied both motions. J.A. 222, 224.

[2] The third perpetrator, David Targee, was also charged and became the key witness for the prosecution. *See* J.A. 239-45. His case was handled in juvenile and domestic relations district court and is not addressed in the decision that is the subject of this writ of certiorari.

Tried by a jury on February 22-23, 1999, Elliott was convicted of attempted cross burning. J.A. 252. The circuit court sentenced Elliott to 90 days in jail and fined him $2,500. J.A. 254. Elliott appealed.

Meanwhile, after losing his motion to dismiss, O'Mara entered a conditional guilty plea under Va. Code § 19.2-254, thereby preserving his constitutional objection. The circuit court sentenced O'Mara to 90 days in jail and fined him $2,500. Half of the jail time and $1,000 of the fine were suspended. J.A. 257. O'Mara appealed.

With their cases consolidated on appeal, both O'Mara and Elliott maintained that § 18.2-423 is "unconstitutional as violative of the free speech and expression protections guaranteed by both the United States and Virginia Constitutions." *O'Mara*, 535 S.E.2d at 177, J.A. 259 (internal quotation marks omitted). The Virginia Court of Appeals disagreed:

> Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets *only* expressive conduct undertaken with the *intent to intimidate* another, conduct clearly proscribable both as *fighting words* and a *threat of violence*. The statute *does not discriminate* in its prohibition and is neither overbroad nor underinclusive.

O'Mara, 535 S.E.2d at 181, J.A. 268 (emphasis added). Thus, the Court of Appeals affirmed the convictions. *Id.* Elliott and O'Mara then appealed to the Virginia Supreme Court, which consolidated their cases with the appeal of the third cross burning defendant, whose case will now be discussed.

Carroll County – August 22, 1998: Unlike the other two respondents, Barry Elton Black is a Klansman. A leader in the Klan, Black led a rally and cross burning in Carroll County, Virginia, on the evening of August 22, 1998. J.A. 58-59. This incident took place on private property with the permission of the owner – but in public view, a fact the decision below does not note. While a part of the property could not be seen from the roadside, this was not the spot chosen for erecting the cross. Instead, it was erected and burned where passers-by could clearly see it. Standing 25 to 30 feet tall, the burning cross was visible along a three-quarter mile stretch of state roadway, where cars passed at the rate of about 40 to 50 miles per hour. *Id.* at 112-13.[3] The reaction of one black family driving along the road was noted by a deputy sheriff. They "stopped and looked across the field" toward the burning cross, then "took off at a higher than normal rate of speed." *Id.* at 112.

The burning cross was also clearly visible from 8 to 10 nearby houses, including the home of Rebecca Sechrist. *Id.* at 124. Her home was close enough that she could hear Klan speakers "talk real bad about the blacks and the Mexicans." *Id.* at 176. "One guy got up and said he would love to take a .30/.30 and just random[ly] shoot the blacks . . . ." *Id.* at 130. So intimidating was the scene that Mrs. Sechrist – who is neither black nor Hispanic – "sat there

[3] The very public nature of the display is confirmed by a photograph of the scene, showing the open field where the cross was burned and the long stretch of adjacent highway. J.A. 65-66, 192. Another photograph shows a secluded area on the same property where the Klan could have held its rally out of public view, without the intimidating effect on passers-by. J.A. 65-66, 193. *See also* J.A. 104-05 (describing alternative location behind trees on same property).

and . . . cried," terrified that the Klan might burn her home or harm her children. *Id. at* 131.

Admitting his responsibility for the cross burning, Black was arrested by the county sheriff and a deputy for violating Va. Code § 18.2-423. En route to jail, Black volunteered his complaint about "blacks and Mexicans . . . walking up and down the sidewalk with white women holding hands and taking all the jobs." He also asked "When is the white man going to stand up to the blacks and Mexicans in this area?" *Id.* at 155.

Black defended against the charge by challenging the constitutionality of the statute, moving to dismiss his indictment on the theory that the statute violates the First Amendment of the United States Constitution and comparable provisions of the Virginia Constitution. In a letter opinion, the trial court rejected Black's arguments, saying:

> This Court accepts the Commonwealth's position that the Code Section 18.2-423 reaches only the crime of intimidation when an accused *actually intended to intimidate others* by his actions, such limitation saves the statute from being a proscription of speech in violation of the First Amendment and . . . the Virginia Constitution.

J.A. 10.

Black was tried before a jury, who convicted him of the offense charged. Fined $2,500, he appealed. J.A. 200. Like the trial court, the Virginia Court of Appeals rejected Black's arguments. Having decided the Virginia Beach case just a few weeks earlier, the Court of Appeals issued a one sentence opinion, affirming the judgment of the trial court "for the reasons stated in *O'Mara v. Commonwealth*." J.A. 201. Black again appealed.

The Virginia Supreme Court consolidated Black's appeal with the Elliott and O'Mara appeals. Taking up the free speech issues raised by the three defendants, the Court concluded that:

> [D]espite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the *basis of its content*, and the statute is *overbroad*.

Black, 553 S.E.2d at 740, J.A. 270 (emphasis added).

By a vote of 4 to 3, the Virginia Supreme Court struck down the Commonwealth's ban on cross burning, believing it to be "analytically indistinguishable" from the St. Paul ordinance declared unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *Black*, 553 S.E.2d at 742, J.A. 275.[4] The Virginia Supreme Court also found fault with that part of the statute that makes the burning of a cross prima facie evidence of an intent to intimidate, striking down the inference under a flawed application of the overbreadth doctrine. *Black*, 553 S.E.2d at 743-46, J.A. 276-285.

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[4] Having resolved the case based on the federal constitutional issues, the Court found it unnecessary to address the respondents' state constitutional claims. *Black*, 553 S.E.2d at 746 n.9, J.A. 285 n.9. Moreover, as the Virginia Court of Appeals observed in rejecting their state claim: "Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *O'Mara*, 535 S.E.2d at 178, J.A. 262 (quoting *Bennefield v. Commonwealth*, 467 S.E.2d 306, 311 (Va. App. 1996)).

SUMMARY OF ARGUMENT

> ***"Few things can chill free expression and association to the bone like night-riders outside the door and a fiery cross in the yard."***

State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995).

This case involves two important freedoms: freedom of speech and freedom from fear. In an attempt to leave the first freedom intact, while securing the second, the Virginia General Assembly long ago enacted a ban on cross burning, but *only* when accompanied by an intent to intimidate someone. The Virginia law does not limit its protection to those of a particular race, religion or background. It protects everyone. Even so, the Virginia Supreme Court read this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), to mean that such a law constitutes unconstitutional content discrimination. This was error for several reasons.

First, unlike the local ordinance at issue in *R.A.V.*, the Virginia statute is content-neutral. It is not limited to disfavored subjects or particular victims. Rather, it applies to *anyone* who burns a cross with the intent to intimidate *anyone* for *any reason*. In this sense, it is similar to the cross burning statute upheld in Florida and fundamentally different from the cross burning statutes struck down in Maryland, New Jersey, and South Carolina.

Second, contrary to the reasoning of the lower court, the legislature's purpose in enacting the Virginia statute does not alter its content-neutrality. Quite simply, the motivations of the Virginia General Assembly in enacting the statute are irrelevant. All that matters is the text and, as the lower court conceded, the law is content-neutral. Moreover, if the legislative purpose were relevant, the

Virginia legislature was motivated by the legitimate purpose of promoting law and order. Furthermore, even if there were mixed motives for the statute – some legitimate and some illegitimate – the statute is still constitutional. An illegitimate motive can doom a content-neutral statute, if at all, only when there is clearly no evidence of any legitimate motive whatsoever.

Third, a historical matter, the Virginia statute was passed in response to cross burnings by the Ku Klux Klan and similar groups bent upon intimidation of black Virginians. J.A. 281. Even today, many acts of intimidation by cross burning may be intertwined with expressions of racial or religious bigotry. And, as the decision below points out, the statute does not ban the burning of other geometric configurations, such as a circle or a square. Yet, such matters are constitutionally irrelevant. The statute only reaches speech that can be constitutionally proscribed and does so with language that is content-neutral. Thus, it is constitutional.

Fourth, even if this Court were to include that the Virginia statute is not content-neutral, the statute is fully consistent with *R.A.V.* Specifically, the Virginia statute fits all three of the *R.A.V.* exceptions. Cross burning is an especially virulent form of intimidation. Since it is constitutionally permissible to ban all forms of intimidation, it is constitutional to ban its most virulent forms. Moreover, cross burning has an array of secondary effects that justify its proscription. Furthermore, because the statute applies to anyone who burns a cross with the intent to intimidate anyone for any reason, and because of the other factors surrounding this statute, there is no possibility of official suppression of ideas.

Finally, the Virginia statute is not overbroad. The decision below misapplied the overbreadth doctrine as recognized by this Court. The lower court did not find the law to be vague, or to prohibit speech that is constitutionally protected. What troubled the court was the statutory inference, which allows – but does not require – a jury to infer an intent to intimidate from an act of cross burning alone. The inference leaves the burden of proof squarely on the prosecution, and it otherwise meets familiar constitutional criteria for statutory inferences. Even so, the court was concerned that somewhere, somehow an innocent cross burner might be charged. Yet, as this Court's decisions, make clear, a statute is fatally overbroad only if there is both "real" overbreadth, by *prohibiting* constitutionally protected expression, and "substantial" overbreadth, by prohibiting a *significant amount* of such expression. Because the statute, by its terms, is limited to acts of intimidation, it does not prohibit any protected expression. Moreover, respondents have not and cannot point to a single instance, much less numerous instances, of anyone being prosecuted under the statute for an innocent cross burning. For these reasons, too, the decision below is in error.

ARGUMENT

I. THE VIRGINIA STATUTE IS CONTENT-NEUTRAL.

A. Unlike the Ordinance in *R.A.V.*, the Virginia Statute Is Not Limited to Disfavored Subjects.

The Virginia Supreme Court struck down the Virginia cross burning statute because it believed the law was

"analytically indistinguishable" from the ordinance declared unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *Black*, 553 S.E.2d at 742, J.A. 275. This was error. The two laws are substantially different.

Confined to certain disfavored topics, the St. Paul ordinance said:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of *race, color, creed, religion or gender* commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V, 505 U.S. at 380 (quoting Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)) (emphasis added).

Before *R.A.V.* reached this Court, the ordinance had been limited by the Minnesota Supreme Court to reach only "fighting words," a form of speech that can be constitutionally proscribed. *Id.* at 381 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)).[5] Even so, this

[5] The concept of "fighting words" – and their exclusion from the right of free expression – was recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). "Fighting words" are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The focus is not on any likely follow-up by the speaker, but on the likely response by the person to whom the words are said. *See, e.g., id.* at 573 ("[F]ighting words" have the "characteristic of plainly tending to excite the *addressee* to a breach of the peace.") (emphasis added).

Court found the ordinance to be facially unconstitutional because, it applied only to those particular "fighting words" that insult or provoke violence "on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 391. As the Court explained:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id. In other words, the St. Paul ordinance was invalid not because it banned fighting words, but because it banned *only* those fighting words which were addressed to *specific disfavored subjects*.

The Virginia statute is markedly different. First, the focus of the Virginia statute is intimidation.[6] Fighting words and intimidation are alike in that they can both be constitutionally proscribed. *R.A.V.*, 505 U.S. at 388

[6] In Virginia criminal law, "intimidation" means acts that put the victim "in fear of bodily harm." *Black*, 553 S.E.2d at 751, J.A. 297-98 (Hassell, J., joined by Carrico, C.J., Koontz, J., dissenting) (quoting *Sutton v. Commonwealth*, 324 S.E.2d 665, 669 (Va. 1989)). "Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic or hysteria." *Id.*

("[T]hreats of violence are outside the First Amendment.").[7] But intimidation is a far more insidious evil. Hurling an epithet may sometimes provoke a breach of the peace in the heat of the moment, but the danger is likely soon to pass. It is different with intimidation. A threat to do bodily harm to an individual or his family is likely to sink deep into the psyche of its victim, acquiring more force over time. So it was, for example, with James Jubilee, whose initial reaction of anger soon gave way to fear about what might come next. J.A. 231. "The value of a sword of Damocles is that it hangs – not that it drops." *Rafeedie v. INS*, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989) (Ginsburg, J., concurring).

Second, and more importantly, unlike the St. Paul ordinance, the Virginia law is not limited to any set of disfavored subjects. It applies whenever *anyone* burns a cross to intimidate *anyone* for *any* reason. Political affiliation, union membership *vel non*, sexual orientation, age, gender, personal grievance: it makes no difference what may prompt the intimidation. So long as there is an intent to intimidate, *all* acts of cross burning are banned. All are

[7] While there is some overlap between fighting words and intimidation, the two concepts are different. In some circumstances, words that are intended to intimidate another may trigger an instinct for self-preservation and/or provoke such anger as to lead to an immediate breach of the peace. *See, e.g., Chaplinsky,* 315 U.S. at 573 ("[T]hreatening" words are "likely to cause a fight."). In other circumstances, where the threat is conveyed anonymously, or where it is made to the very weak or the very powerful, it is unlikely to provoke a violent reaction. Even so, such threats may be constitutionally proscribed. *See, e.g., Watts v. United States*, 394 U.S. 705, 707 (1969) (explaining that statute criminalizing threats against the President is facially constitutional).

subject to the same punishment. Thus, the statute is content-neutral.

1. Similarly Worded Laws Have Been Deemed Content-Neutral.

This conclusion is supported by the post-*R.A.V.* decision of the Florida Supreme Court, which upheld that State's cross burning law[8] using the same rationale now urged by the Commonwealth in defense of the Virginia statute:

> The present statute comports with R.A.V. because the Florida prohibition is "not limited to [any] favored topics," but rather cuts across the board evenly. No mention is made of any special topic such as race, color, creed, religion or gender.
>
> * * *
>
> The statute is a legitimate legislative attempt to protect Floridians of every stripe from a particularly reprehensible form of tyranny. The

[8] Section 876.18, Fla. Stat. (1993) provides:

> **Placing burning or flaming cross on property of another**. – It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree. . . .

The Florida Supreme Court found this statute to be content-neutral within the meaning of *R.A.V.* even though it lacks the "intent to intimidate" element so prominent in the Virginia law.

> statute plays no favorites – it protects equally the Baptist, Catholic, Jew, Muslim; the Communist, Bircher, Democrat, Nazi, Republican, Socialist; the African-American, Caucasian, Haitian, Hispanic, native American, Vietnamese; the heterosexual, the male homosexual, the lesbian; the established politician, the neophyte, the activist; the author, the editor, the publisher; the artist, the curator; the teacher, the school administrator; the union organizer, the plant owner.

State v. T.B.D., 656 So. 2d 479, 481-82 (Fla. 1995), *cert. denied,* 516 U.S. 1145 (1996). Like the Florida law, the Virginia statute "plays no favorites." It, too, is content-neutral – and constitutional.

2. Statutes Invalidated under the Reasoning of *R.A.V.* Are Distinguishable Because They Lacked an Intimidation Element Or Contained Content Distinctions.

These two features of the Virginia law – the intimidation element and the absence of any content-based categories – distinguish this case from the three state supreme court decisions striking down cross burning statutes in the wake of *R.A.V.* The South Carolina statute invalidated in *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993), contained no intimidation element. *See* S.C. Code Ann. § 16-7-120 (1985). Neither did the Maryland law overturned in *State v. Sheldon*, 629 A.2d 753 (Md. 1993). *See* Md. Code Ann. art. 27, § 10A (1957). The New Jersey statute had an intimidation element, but also contained problematic content-based restriction, limiting its sweep to "the basis of race, color, creed or religion." N.J. Stat. Ann. § 2C:33-10

(1995). Thus, the law was declared unconstitutional. *State v. Vawter*, 642 A.2d 349 (N.J. 1994). Given these important distinctions, none of these three cases presents a persuasive basis for striking down the Virginia law.

II. THE LEGISLATURE'S PURPOSE DOES NOT ALTER THE CONTENT-NEUTRALITY OF THE VIRGINIA STATUTE.

Although the lower court conceded that the Virginia statute contains no content-based categories, it was not satisfied with this level of inquiry. Instead, it looked to what it thought was the legislature's "motivating purpose" and found it problematic. *Black*, 553 S.E.2d at 744, J.A. 279. There are three errors in this assessment. First, legislative motivation is irrelevant here. Second, even if legislative purpose were relevant, there would be no basis for concluding that the legislature had any purpose in mind other than to prevent intimidation. Third, even if legislative purposes were mixed – some legitimate and some not – the statute still must be upheld based on the legitimate purpose of preventing intimidation.

A. Legislative Purpose Is Irrelevant.

The motivations of the Virginia legislature are irrelevant. The Virginia Supreme Court based its inquiry into legislative purpose on a misreading of *United States v. Eichman*, 496 U.S. 310 (1990), where this Court struck down a federal law that prohibited burning or physically desecrating the United States flag. *Black*, 553 S.E.2d at 743-44, J.A. 279-80. The cases are very different. This Court has made it clear that the act of desecrating the flag

enjoys the full protection of the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Eichman*, 496 U.S. at 315. By contrast, the act of burning a cross is typically not intended to heap calumny upon the Christian religion, but to intimidate a victim. Intimidation can be constitutionally proscribed. *R.A.V.*, 505 U.S. at 388. Where there is no intent to intimidate, the Virginia statute does not apply.

Moreover, the government interest asserted in *Eichman* was preserving the flag as the "unique and unalloyed symbol of the Nation." *Eichman*, 496 U.S. at 315. Thus, while there was "no *express* content-based limitation on the scope of the prohibited conduct, it [was] nevertheless clear that the Government's asserted interest [was] *related* to the suppression of free expression." *Id.* at 315 (emphasis added). Indeed, the content-based limitation was *implicit*. While cast in positive language, the asserted government interest was simply the "flip-side" of an unconstitutional objective. Here, the interest asserted by Virginia is preventing an egregious form of intimidation. Such an interest is not related to the suppression of free expression. Admittedly, intimidation by cross burning is a tactic introduced into our society by a radical group notorious for its bigoted views on race and religion, but this is not the sort of "relationship" at issue in *Eichman*.

Instead, the relevant precedents are found in *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), and *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000). In both cases, this Court upheld laws as facially neutral even though the Court acknowledged that they were enacted in response to partisans on one side of an issue. In *Frisby*, the Court

upheld an ordinance that prohibited picketing in front of an individual residence.[9] The ordinance was adopted in response to activities by one group – anti-abortion demonstrators – who had been picketing in front of a doctor's home. *Frisby*, 487 U.S. at 476. Even so, this Court determined that the statute was content-neutral because it prohibited *all* picketing in front of a residence, regardless of the message being conveyed. *Id.* at 482.

Similarly, in *Hill*, this Court upheld an ordinance that imposed significant restrictions on speech within 100 feet of an entrance to any health care facility. Within this restricted zone, the ordinance made it unlawful to knowingly approach within 8 feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with [that] person." *Hill*, 530 U.S. at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)). The motivation for the law was to restrict abortion protestors in venues where abortions are performed, a point confirmed by the statutory preamble.[10] Yet, despite the causal connection and statement of purpose, this Court found the statute to be content-neutral because its prohibitions appeared even-handed:

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[9] The ordinance read: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Frisby*, 487 U.S. at 477.

[10] The statute declared that "the exercise of a person's right to *protest or counsel against certain medical procedures* must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner." *Hill*, 530 U.S. at 708 n.1 (quoting Colo. Rev. Stat. § 18-9-122(1) (1999)) (emphasis added). No one on the Court doubted that this was a euphemistic reference to abortion.

> The statute is not limited to those who oppose abortion. . . . It applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands.

Id. at 725.[11]

The activities restricted in *Frisby* and *Hill* were fully protected by the First Amendment. *Frisby*, 487 U.S. at 479 (noting that "antipicketing ordinance operat[ed] at the core of the First Amendment"); *Hill*, 530 U.S. at 714 ("The First Amendment interests of petitioners are clear and undisputed."). By contrast, the acts of intimidation at issue here can be constitutionally proscribed. *R.A.V.*, 505 U.S. at 388. Surely, the requirement for content-neutrality cannot be more stringent in the case at bar than it was in *Frisby* or *Hill*. While the Virginia statute was enacted in

[11] In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), this Court upheld as content-neutral a state court injunction that limited expressive activity by abortion protestors without imposing similar restrictions on abortion proponents. In so ruling, the Court "look[ed] to the government's purpose as the threshold consideration." *Id.* at 763. Such an inquiry into purpose was necessary there in order to determine whether the injunction – which was content-based on its face – was truly content-based for constitutional purposes. Explaining that abortion opponents and abortion supporters had dissimilar records of activity – and that abortion opponents had repeatedly violated the state court's original order – this Court concluded that the order was content-neutral. *Id.* at 762, 763. "[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content- or viewpoint-based." *Id.* at 763. Because the Virginia statute is neutral on its face, the Court need go no further.

response to intimidation by the Klan, it is not limited to the Klan, nor to those who share the Klan's racial and religious bigotry. Rather, it applies to all acts of cross burning with intent to intimidate, regardless of the views of the perpetrator. Thus, it satisfies the level of neutrality required by this Court's precedents.[12]

B. If Legislative Purpose Is Relevant, the Statute Is Still Constitutional Because Virginia's Purposes Are Legitimate.

If this Court were now to decide that legislative motivation is relevant, it should nevertheless defer to Virginia's articulation of a legitimate purpose. "Inquiries into congressional motives or purposes are a hazardous matter . . . and the stakes are sufficiently high for us to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (upholding statute banning burning of draft

[12] Dissenting in *Hill*, Justice Kennedy viewed the Colorado statute as an impermissible, content-based restriction on speech, believing it had the potential for treating speakers differently depending on their viewpoint. *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting). He noted, for example, that a speaker in the protected zone would not be breaking the law if she praised Supreme Court abortion decisions or congratulated politicians who favored abortion rights. *Id.* at 769. On the other hand, if another speaker in the zone criticized those same decisions or sought to shame that same politician, she would be engaged in a "protest" in violation of the same statute. *Id.* Justice Kennedy's concern does not apply here because the Virginia statue lacks any potential for such uneven application. It bans *all* cross burning with intent to intimidate. For example, while it *prohibits* the bigot from using the tactic, it likewise *protects* the bigot against others in the community who might wish to give him a taste of his own medicine; and it applies with equal force against anyone wishing to intimidate anyone for any reason whatsoever.

cards). In another First Amendment context – the Establishment Clause – this Court typically defers to the State's proffered explanation, at least where it is "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). Moreover, "a court has no license to psychoanalyze the legislators." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring). By analogy, any inquiry into legislative purpose here must also be "deferential and limited." *Id.*

There is nothing here to show any purpose other than a wholly legitimate one. Indeed, there is very little to show legislative purpose at all. There is no legislative preamble, no committee report and no official record of floor debates. Instead, there are several old newspaper articles, cited by the Virginia Supreme Court, showing a rash of cross burnings in the years leading up to passage of the original statute in 1952. *See Black*, 553 S.E.2d at 742 n.2, J.A. 274 n.2. These incidents were, in the words of the time, "un-American act[s], designed to intimidate Negroes from seeking their rights as citizens." *Police Aid Requested By Teacher, Cross is Burned on Negro's Yard*, Richmond News-Leader, Jan. 21, 1949, at 19, J.A. 312. The articles also report the stated purpose of the measure. The bill was presented to the House of Delegates by a former FBI agent, Delegate Mills E. Godwin, Jr., who later became twice Governor of Virginia. According to the article: "Godwin said law and order in the State were impossible if organized groups could create fear by intimidation." *Bill to Curb KKK Passed By the House, Action is Taken Without Debate*, Richmond Times Dispatch, Mar. 8, 1952, at 5, J.A.

325.[13] This is the best available statement of the motivating purpose, and it is wholly legitimate.

The decision below seems to imply that the statute may have been enacted as a gesture of modern day political correctness. History belies the suggestion. In 1952, when the statute was enacted, racial segregation was still the prevailing practice – and often the law – in Virginia.[14] Indeed, the General Assembly that originally banned cross burning in 1952 was substantially the same legislature as the one that soon initiated a campaign of "massive

[13] In 1952, Virginia already had in place a statute banning intimidation by written communications. Va. Code § 18-134 (1950) (recodified in 1952 as § 18.1-257). The penalty for a violation included up to five years in prison. The same maximum incarceration penalty was adopted for violation of the cross burning ban. Va. Code § 18-349.4 (1952). The same statutory parallelism was in place in 1998, when these two acts of cross burning were committed. Both were class six felonies. *Compare* Va. Code § 18.2-60(A) (1998) *with* § 18.2-423 (1998). They still are.

[14] *See, e.g.*, Va. Code § 18-327 (1952) (repealed 1960) (required separation of "white" and "colored" at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code § 20-54 (1950) (repealed 1968) (prohibited racial intermarriage); Va. Code § 22-221 (1952) (repealed 1972) ("White and colored persons shall not be taught in the same school . . . "); Va. Code § 24-120 (1952) (repealed 1970) (required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code § 38-281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code § 53-42 (1950) (amended to remove "race" 1968) (required racial separation in prison); Va. Code § 56-114 (1950) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code § 56-326 (1950) (repealed 1970) (required motor carries to "separate" their "white and colored passengers," violation was misdemeanor); Va. Code § 56-390 and 396 (1950) (repealed 1970) (same for railroads); Va. Code § 58-880 (1950) (repealed 1970) (required separate personal property tax books for "whites" and "colored").

resistance" in response to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See generally, Griffin v. County School Board*, 377 U.S. 218, 221 (1964); *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959) (describing "massive resistance" as legislatively mandated attempt to close public schools rather than desegregate). Clearly, the legislature's purpose was *not* to usher in a new era of racial equality, or to disfavor ideas of white supremacy. The purpose was to prevent a particularly virulent form of intimidation and thus to preserve law and order. It is a purpose still legitimate today.

C. Even If There Was Also an Illegitimate Purpose, the Legitimate Purposes Control.

Even if this Court were to decide that the legitimate purpose of preventing intimidation was combined with some illegitimate motive, the statute would still be constitutional. This Court has rejected the idea that an illegitimate motive will make a law invalid "no matter how small a part [the] motivating factor may have played" in the legislature's decision. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (citing *O'Brien*, 391 U.S. at 382-86). Instead, where the "predominate intent" is unrelated to the suppression of free expression, that legitimate motive is "more than adequate" to uphold the statute. *Renton*, 475 U.S. at 48. Here the predominant intent – indeed, the exclusive intent – was to prevent intimidation. Thus, the statute is constitutional.

Given the obviously legitimate purpose, there is no need to decide how large some hypothetical, illegitimate motive must be before the resulting statute would be invalid. Even so, it may be helpful to note again the approach followed in Establishment Clause cases. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court

requires statutes to have "***a*** secular legislative purpose." *Id.* at 612 (emphasis added). Statutes arising from *mixed* motives – some legitimate and some illegitimate – will not be struck down based on a purpose test. "The Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added).[15] If this Court were to consider legislative purpose, the same approach should be followed here. An illegitimate purpose should not doom an otherwise constitutional enactment unless there is *no* evidence of a legitimate purpose. Because the statute is facially neutral, and because it was motivated – in whole or in part – by the legitimate purpose of preventing intimidation, it survives constitutional scrutiny.

III. CROSS BURNING CAN BE USED TO INTIMIDATE ANYONE; ANY NUMERICAL CORRELATION BETWEEN CROSS BURNING AND BIGOTRY DOES NOT UNDERMINE CONTENT-NEUTRALITY.

The court below did not find that cross burning is limited to the Klan, or that the tactic can only be used by

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[15] Justice O'Connor's concurring opinion in *Lynch* takes a somewhat different tack, warning against reliance on secular purposes that are *de minimus*. *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (expressing view that first prong is not satisfied by "mere existence of some secular purpose, however dominated by religious purposes"). Yet, this cautionary note would not help respondents here, where the legitimate purposes are obviously substantial.

persons espousing ideas of racial or religious bigotry. Nor have respondents made such a suggestion. *See generally,* Br. in Opp. to Cert. Indeed, this case would refute any such claim. Two respondents – Elliott and O'Mara – burned a cross to frighten a neighbor in Virginia Beach. Yet, they are not Klansmen, nor do they have any discernible ideas on race, religion or any other topic. They burned a cross on the neighbor's lawn because he asked questions about gunfire in Elliott's backyard. Elliott and O'Mara did not have a political agenda, they had a personal grievance. People of *any* race can be frightened by cross burnings. So intimidating was the incident in Carroll County that one witness – who is Caucasian – was brought to tears, fearing for the safety of her children and home. J.A. 111.

A burning cross – standing alone and without explanation – is understood in our society as a message of intimidation. "[T]he pernicious message of such conduct [is] a clear and direct expression of an intention to do one harm, [and] constitutes a true threat envisioned by *Watts [v. United States]* irrespective of racial, religious, ethnic or like characteristics peculiar to the victim." *O'Mara*, 535 S.E.2d at 179, J.A. 264. A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police.

Undoubtedly, many acts of intimidation by cross burning are intertwined with expressions of racial or

religious bigotry. Yet, arguments based upon such numerical correlation cannot prevail. To begin, the record is devoid of any quantitative evidence that might provide a basis for statistical analysis. Moreover, even if the correlation were assumed to be high, this Court has rejected a statistical approach to constitutional questions arising under the First Amendment. Decided last term, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002), was an Establishment Clause challenge to a school voucher plan enacted by the Ohio legislature. Although the challenged statute was facially neutral, a higher percentage of participating students were enrolled in religiously affiliated schools. In one city, the number was ninety-six percent. *Id.* at 2464. Opponents of the statute argued that this high correlation undermined the religious neutrality appearing on the statute's face. The Court disagreed, saying that "such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." *Id.* at 2470 (quoting *Mueller v. Allen,* 463 U.S. 388, 401 (1983)). The Court also noted that a statistical approach would lead to inconsistent results, striking down statutes where the correlation seems too high but leaving the same or similar statutes in place where the correlation is deemed low enough to be acceptable. *Id.* at 2470-71.

The same principle is at work here. The Virginia statute is facially neutral. It bans cross burning by *anyone* whose intent is to intimidate *anyone* for *any reason*. This facial neutrality is not undermined by the supposedly high correlation between such acts of intimidation and intertwined expressions of racial or religious bigotry. A numerical approach is precluded by the lack of principled

standards for evaluating what statistical evidence might show. There is no way to draw a line based on statistics other than to do so arbitrarily. A numerical approach is also precluded by the need to avoid inconsistent results. It would be a perverse outcome, indeed, if cross burning bans were invalid in States where the tactic is aimed primarily against minorities, but valid where the tactic is more racially neutral in its application.

Zelman and *Mueller* are not the only cases where members of this Court have rejected numerical correlation as a tool for examining facially neutral statutes challenged under the First Amendment. In *Hill*, there was a high correlation between the prohibited activity – protests outside health facilities – and opposition to abortions. Yet, the statute was upheld as facially neutral. In their concurring opinion, four Justices said:

> It is important to recognize that the validity of punishing some expressive conduct . . . does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion.
>
> * * *
>
> *There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy*. But that does not mean that every regulation of such distinctive behavior is content-based as First Amendment doctrine employs that term. The correct rule, rather, is captured in the formulation that a restriction is content-based only if it is imposed because of the content of the speech.

Hill, 530 U.S. at 737 (Souter, J., joined by O'Connor, Ginsberg and Breyer, JJ., concurring) (emphasis added).

Whether drawn from the *Zelman* majority or the *Hill* concurrence, the same principles should apply here. Any numerical correlation between intimidation by cross burning and the expression of racial or religious bigotry is irrelevant. Unlike the ordinance struck down in *R.A.V.*, the Virginia statute is neutral on its face. Thus, it is constitutional.

The Virginia Supreme Court also suggested that the Virginia statute is impermissibly content-based because, while it bans the burning of *crosses* with intent to intimidate, it does not ban the burning of "other geometric shapes," such as "circles and squares." *Black*, 553 S.E.2d at 745, J.A. 281. Yet there is a good reason for focusing on crosses. There is a history and practice of intimidation by cross burning that has no counterpart with other geometric shapes. The record contains no evidence of anyone ever burning a circle or square for any expressive purpose, much less a purpose of intimidation. Indeed, the Commonwealth is unaware of a single reported American case concerning a burning circle or a burning square used to intimidate. In our society, a burning cross *means* intimidation. By contrast, burning a circle or a square expresses nothing.[16] As the Virginia Supreme Court recognized, "no animating message is contained in such an act." *Black*, 553 S.E.2d. at 745, J.A. 281. Given this concession, it is difficult to understand why the Virginia Supreme Court thought content discrimination was afoot. Indeed, it is not.

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[16] While there may be occasions in our society when other religious symbols are burned, such acts of destruction – like the burning of the United States flag – are typically understood as dissent from the ideas and institutions such symbols represent, not as attempts to intimidate.

Perhaps someday, somewhere, somebody in Virginia may intimidate someone – and simultaneously express an idea – by burning some geometric shape other than a cross. But such speculation does not make the current law invalid. "States adopt laws to address the problems that confront them. The First Amendment does not require states to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 191, 207 (1992).[17] The Virginia statute seeks to deal with a tactic of intimidation that has been a source of trouble in the past, without speculating about future developments, and without trivializing cross burning by equating it, say, with a burning Jack O'Lantern impishly left on a neighbor's porch at Halloween.

Finally, the principle of content-neutrality is designed to avoid the evil of a statute "lend[ing] itself" to "invidious thought-control purposes." *Madsen*, 512 U.S. at 794 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and dissenting in part). However, "a statute that restricts certain categories of speech only lends itself to invidious use if there is a *significant* number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." *Hill,* 530 U.S. at 723 (emphasis added).

[17] In *R.A.V.*, the majority expressed concern about this passage from *Burson* being converted into "the revolutionary proposition that the suppression of particular *ideas* can be justified when only those *ideas* have been a source of trouble in the past." 505 U.S. at 396 n.8 (emphasis added) (citing 505 U.S. at 405 (White, J., concurring in judgment) and 505 U.S. at 434 (Stevens, J., concurring in judgment)). Here it is not the suppression of *ideas* that is afoot, but the prevention of intimidation.

There are *no* communications raising the same problem that the cross burning ban was enacted to solve – and certainly not a "significant number" of them. Nor did the court below purport to identify any. The statute does not lend itself to invidious use. It is content-neutral – and constitutional.

IV. ALTERNATIVELY, IF THE VIRGINIA STATUTE IS DEEMED CONTENT-BASED, IT IS JUSTIFIED BY THE THREE EXCEPTIONS IN *R.A.V.*

It is a familiar principle of First Amendment law that content discrimination is generally prohibited. The Virginia statute complies with this principle. Even so, the principle is "not absolute." *R.A.V.*, 505 U.S. at 387. Moreover, the principle "applies *differently* in the context of proscribable speech than in the area of fully protected speech." *Id.* (emphasis added). This is so because the reason for the general prohibition has only limited relevance in dealing with speech that can be constitutionally proscribed:

> The rationale of the general prohibition, after all, is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

Id. at 387-88 (internal quotation marks and citations omitted). The Court then recognized three broad exceptions to the general rule against content-based distinctions. Assuming *arguendo* that the Virginia cross burning

statute constitutes "content discrimination," it nevertheless qualifies as constitutional under all three exceptions.[18]

A. Cross Burning Is an Especially Virulent Form of Intimidation.

In laying out its first exception, *R.A.V.* said that a subclass of proscribable speech may be singled out when it manifests, in some extreme form, the concerns that allow the whole class to be proscribed:

> When the basis for the content discrimination consists entirely of the *very reason* the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

R.A.V., 515 U.S. at 388 (emphasis in original). The Court then explained its rationale with an example:

[18] In *State v. Talley*, 858 P.2d 217 (Wash. 1993), the Washington Supreme Court rejected a *R.A.V.*-based challenge to a statute that prohibited various acts, including cross burning with "intent to intimidate another person." Unlike the Virginia statute, the Washington law added certain content-based qualifications. The intent to intimate had to be related to "that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap." Washington Code § 9A.36.080(1). While the Washington statute was obviously not content-neutral, the Court nevertheless found the law to be justified by each of the three *R.A.V.* exceptions. If these exceptions save the Washington statute, *a fortiori* they should also save the Virginia law.

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience – i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.

Id. (emphasis in original). Just as a State may choose to prohibit only that obscenity which is *most lascivious*, it may also choose to enact a statute focusing on acts of intimidation that are *most virulent* – that is to say, acts that demonstrate with "special force" the reasons why "threats of violence are outside the First Amendment." *Id.* The Court has given three such reasons: "protecting individuals [1] from the fear of violence, [2] from the disruption that fear engenders, and [3] from the possibility that the threatened violence will occur." *Id.* Cross burning operates with "special force" with respect to all three. *See In re Steven S.*, 31 Cal. Rptr. 2d 644, 650 (Cal. App. 1994) ("[U]nauthorized cross burning on another person's private property . . . invokes all three of the exceptions set forth in *R.A.V.*").[19]

Although cross burning is sometimes called "hate speech," that label is not quite right. It is something far worse. "Hate speech" need only make a statement about

[19] While the California statute applies only when the cross burning occurs without permission on the property of another, it is difficult to see any practical distinction between burning a cross in someone's front lawn and burning the same cross in the public right-of-way just outside the victim's property. Moreover, while cross burning at a *secluded* Klan rally may intimidate no one, there is intimidation when the cross is burned – as it was in Carroll County – in a place visible to neighbors and passers-by.

the attitudes of the speaker. Cross burning is a form of intimidation – a threat of harm. It makes a statement about harm one or more listeners may expect to suffer. It is a tactic for putting someone in fear for his life or safety, and it is an especially virulent method for doing so. *See In re Steven S.*, 31 Cal. Rptr. 2d at 649, ("[M]alicious cross burning *is* directed at individuals . . . and it goes far beyond hurt feelings, offense, or resentment. It causes terror in specific victims.")

It is no accident that the Ku Klux Klan – grand masters of intimidation – chose a burning cross to do their work. Such a structure instills fear in a way that mere words can rarely equal.[20] As this Court has recognized, use of a symbol bypasses the need for the victim to read and decipher the message, so as to make the effect penetrating and immediate. It is a "short cut from mind to mind." *Johnson*, 491 U.S. at 417. The symbol of a burning cross is especially powerful. It takes fire – an archetype of destruction – and marries it with a deeply evocative icon of Christianity, transmogrifying a sign of heavenly assurance into a hellish threat. The impact is underscored when the cross is burned at night – as is usually the case – when the cover of darkness hides the identity of the perpetrators and taps into the basic human fear of the unknown.

Moreover, the business of constructing, transporting, erecting and igniting a cross suggests more than the effort of a single individual. It suggests the presence of a group, whose size and membership are unknown, but whose

[20] Even so, written threats to kill or do bodily harm are also prohibited by Virginia law. Va. Code § 18.2-60(A).

malevolence – and whose resolve to *act* on that malevolence – is plain enough. The flames are not only a *metaphor* for destruction, they demonstrate a *means* of destruction. By burning a cross in public view, the perpetrators step beyond words, even beyond conventional symbolism, and provide a physical example of what may come. By an act of destruction, they assert their ability – and their will – to engage in further acts of destruction. This is especially so when the victim's own property has been invaded.

The message of a cross burning is this:

> ***We may kill you, or hurt you badly. Believe it. We have already come to your home, and we have done this hateful and dangerous thing in front of you. So, we don't just talk. We act. Next time we may torch your home. Or bomb your car. Or shoot into your windows. No one stopped us when we burned the cross. No one will stop us next time either. Fear us.***

These considerations make cross burning an especially fearsome weapon, thus implicating with "special force" the first reason why threats are constitutionally proscribable – *i.e.* "fear of violence." *R.A.V.*, 505 U.S. at 388.

Another reason why threats are proscribable is to guard against the "disruption that fear engenders." *Id.* This is why it is constitutional to prohibit people from yelling "Fire!" in a crowded theater, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.), or to prohibit threatening the life of the President, *R.A.V.*, 505 U.S. at 388. If this Court were to decide that the historical usage of cross burning somehow imparted content not found in the neutrally worded text, an examination of the same

historical usage would reveal the special sort of disruption that this intimidating tactic engenders. As one legislature expressly found, "cross burnings historically and traditionally have been used to threaten, terrorize, intimidate, and harass African Americans and their families."[21] Washington Code § 9A.36.078. In other words, it has been a tactic to keep African-Americans in the status of second class citizens, thereby disrupting the basic principles espoused by the Declaration of Independence ("all men are created equal") and sought to be accomplished by the Thirteenth and Fourteenth Amendments. Although cast in universal terms, these amendments were prompted by the harshness to which persons of African descent were historically subjected. *See Nixon v. Condon*, 286 U.S. 73, 89 (1932). Surely to disrupt the operation of such fundamental principles is an example of the "special force" contemplated by *R.A.V.* as a justification for content-based distinctions.

Yet another reason why threats are proscribable is to avoid "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. The reason likewise applies with "special force" to cross burnings. As the Florida Supreme Court observed:

> [U]nauthorized cross-burning . . . has been *inextricably linked* in this state's history to *sudden and precipitous violence* – lynchings, shootings, whippings, mutilations, and home-burnings. The connection between a flaming cross in the yard and forthcoming violence is clear and direct. A more terrifying symbolic threat for many Floridians would be difficult to imagine.

T.B.D., 656 So. 2d at 481 (emphasis added). If Virginia's own history has been less sanguinary than some States, its General Assembly is no less aware of the "clear and direct" connection between cross burning and forthcoming violence.

In sum, cross burning presents a special case of intimidation. It is especially terrifying, especially disruptive, and a special harbinger of violence. There is simply no counterpart in our society. This was the judgment of the Virginia General Assembly when, a half century ago, it passed the cross burning statute, even though the Commonwealth's public policy was then one of segregation. There is no reason to overturn its judgment now. This Court should find that the statute qualifies for the first *R.A.V.* exception and uphold the law as constitutional.

B. As a Subclass of Intimidation, Cross Burning Has an Array of Secondary Effects.

For the second *R.A.V.* exception, this Court turned to the "secondary effects" doctrine. It said:

> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "*justified* without reference to the content of the . . . speech."

[21] The result is no different when the cross is burned, not at a targeted home, but at a Klan rally visible to all passers-by. In such a case, the incident is understood to be a threat against those minorities whom the Klan has historically sought to cower. This is illustrated by the talk about "random[ly] shoot[ing] the blacks" that accompanied the cross burning in Carroll County. J.A. 109.

Id. at 389 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). St. Paul sought to invoke this doctrine, arguing that the impact of fighting words on historically disfavored minorities was a "secondary effect" that the ordinance was justified in trying to prevent. The Court disagreed, noting that "[l]istener's reactions" do not qualify as "secondary effects." *Id.* at 394 (quoting *Boos v. Barry*, 485 U.S. 312 (1988)). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.*

By contrast, the Virginia statute – which deals not with mere fighting words, but with virulent intimidation – presents genuine examples of secondary effects akin to those identified by the Court in *Renton*. In *Renton*, the Court approved the challenged ordinance because it was designed to "prevent crime, protect the city's retail trade, maintain property values, and generally '[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" *Id.* at 48. Similarly, the Virginia cross burning statute is intended not just to prevent intimidation of the victim (which, under *Boos*, may or may not be a secondary effect[22]), but to preserve law and order in the surrounding community. J.A. 326. Cross burnings are historically associated not with threatened fisticuffs or other minor assault, but with

[22] While emotive reaction is not a secondary effect, one court has held that "the fear and intimidation of a victim of a malicious cross burning crosses the line between emotive reaction and tangible injury." *In re Steven S.*, 31 Cal. Rptr. 2d at 651. *See also Talley*, 858 P.2d at 226.

threats to burn, lynch, behead or otherwise murder innocent victims. It is not hard to imagine how unchecked spates of intimidation by cross burning could spark retaliation, retard commerce, depress property values and generally transform our society into one reminiscent of Northern Ireland or the Balkans. It was to preserve law and order – and thereby "insure domestic tranquility" – that the General Assembly saw fit to ban cross burning fifty years ago. U.S. Const., Preamble. There is no reason to question its judgment now.

The applicability of the secondary effects doctrine is underscored by the similarity between this case and other aspects of *Renton*. There the adult theater argued that the town's ordinance was constitutionally defective because it "fail[ed] to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters." 475 U.S. at 52. Such other businesses presumably included other forms of expressive activity, such as adult bookstores and adult video stores. Yet, the Court rejected the argument, explaining its position with a logic that applies equally to the case at bar:

> There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton . . . . We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.

Id. at 52-53 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)). Similarly, there is no evidence that, at the time the Virginia statute was enacted, any

other practice of intimidation was abroad in the land with the same capacity to undermine law and order. Nor is there evidence of any such practice today, nor is there any reason to believe that, if some new and comparably intimidating practice were to raise its head in the future, that the General Assembly would not amend Virginia law accordingly.

C. No Official Suppression of Ideas Is Afoot.

For its third exception, *R.A.V.* describes a broad "catch-all" category of content-based distinctions, saying "it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390. Here, no such possibility exists.

Assuming *arguendo* that the Virginia statute contains some form of content-based distinction, it nevertheless qualifies for this third exception as shown by an array of pertinent facts. First, the statute contains no content-based categories. It bans *all* cross burning with intent to intimidate not just cross burning that conveys racial and religious bigotry. *See T.B.D.*, 656 So. 2d at 481. Second, the law was originally enacted by a legislature that embraced a policy of racial inequality. Suppressing such ideas could not have been its purpose. Third, while the Commonwealth no longer adheres to a policy of segregation, Virginia law still leaves ample opportunity for such ideas to be expressed – as the First Amendment requires – so long as they are not intertwined with intimidation. Simply causing "resentment" or "ill-feeling" is not enough to run afoul the Virginia statute. Fourth, the plausibility of the asserted purpose – to preserve law and order – is

confirmed by the spate of cross burnings that preceded the law. Fifth, no comparable form of intimidation was being practiced – not in 1952, and not now. Sixth, other provisions of Virginia law ban intimidation using the written word. Va. Code § 18.2-60(A). To treat cross burning as intimidation is simply to recognize the "shorthand" already in use and already understood by perpetrator and victim alike. Seventh, while the statute does not ban the burning of other geometric shapes, "no animating message is contained in such acts." *Black*, 553 S.E.2d at 745, J.A. 281. In sum, there is no "realistic possibility" that official suppression of ideas is afoot. Cross burning with the intent to intimidate "[a]t its core, is an act of terrorism that inflicts pain on its victim, not the expression of an idea." *In re Steven S.*, 34 Cal. Rptr. 2d at 651. Indeed, this combination of facts "refute[s] the proposition that the selectivity of the restriction is 'even arguably conditioned upon the sovereign's disagreement with what a speaker may intend to say.'" *Id.* at 390 (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (Stevens, J., dissenting in part) (internal marks and citation omitted). For this reason, too, the Virginia statute is constitutional.

V. THE VIRGINIA STATUTE IS NOT OVERBROAD.

A. The Lower Court Misunderstood This Court's Overbreadth Jurisprudence.

The Virginia Supreme Court also ruled that the cross burning statute is void under the overbreadth doctrine. In so ruling, it relied – mistakenly – on Justice White's concurrence in *R.A.V. Black*, 553 S.E.2d at 745-46, J.A. 283-84. Despite the narrowing construction by the Minnesota Supreme Court, Justice White said the law still "criminalize[d] a substantial amount of expression that –

however repugnant – is shielded by the First Amendment." *R.A.V.*, 505 U.S. at 413 (White, J., joined by Blackmun, Stevens, and O'Connor, JJ., concurring). The court below misread Justice White and misunderstood this Court's overbreadth jurisprudence. Indeed, what the court below called "overbreadth" bears little resemblance to the overbreadth doctrine explained by this Court.

Unlike the concurrence in *R.A.V.*, the Virginia Supreme Court did not focus on the statute's prohibitory terms. Instead, it looked at the statutory inference, which allows – but does not require – a jury to infer an intent to intimidate based on the act of cross burning alone.[23] The court did not doubt that the prosecutor still must prove every element of the offense – including intent – beyond a reasonable doubt. Nor did the court otherwise suggest that the statute fails to meet the constitutional requirements that ordinarily govern statutory presumptions. *See Barnes v. United States*, 412 U.S. 837, 842 (1973).[24] Instead, the court focused on the mere *possibility* of arrest and prosecution. Where a cross is burned in a place described by the statute, the court said,

[23] Added in 1968, the last paragraph of the statute provides: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code § 18.2-423. *See also* 1968 Va. Acts ch. 350.

[24] A statutory inference is constitutional if (i) the state retains the burden of proof on the fact to be presumed, and (ii) "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Barnes*, 412 U.S. at 842-43 (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)) (internal quotation marks omitted). The inference in the Virginia statute clearly meets this test.

> the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression. [The Virginia statute] sweeps within its ambit for arrest and prosecution, both protected and unprotected speech. As such it is overbroad.

553 S.E.2d at 746, J.A. 284-85 (citations and footnotes omitted). In other words, what concerned the court was the possibility that an *innocent* cross-burner – *i.e.*, one who burns a cross *without* an intent to intimidate – might still be arrested and prosecuted. The conduct of such a person is not barred by the statute; yet, the court thought the prospect of a trial might chill innocent expression, and that the mere possibility of such an occurrence was sufficient to make the Virginia statute overbroad. This is error.

The court erred in its understanding of both the statutory presumption and the overbreadth doctrine. Contrary to what the court tacitly assumed, the presumption does not purport to direct police officers when to make arrests, nor does it purport to bind prosecutions in the exercise of their discretion. Instead, it comes into play only

at trial, where it may form the basis of one jury instruction among many.[25]

Moreover, the mere possibility that someone might be mistakenly charged does not render a statute overbroad. Indeed, if the lower court were correct in its approach, it would be difficult for *any* regulation of expressive conduct to withstand scrutiny. There will always be cases where conduct that is lawful initially appears culpable and results in charges that are ultimately dismissed. For example, this Court has held that government may constitutionally prohibit possession of child pornography, even where the same images would not be proscribable as obscene if their subjects were adults. *Ferber v. New York*, 458 U.S. 747, 764 (1982). Yet, when confronted with the printed image of a youthful individual engaged in sex, law enforcement officers necessarily must evaluate whether the individual appears to be a minor before deciding whether to make an arrest. Sometimes the evaluation may be difficult. Sometimes the evaluation may be mistaken. Yet, the possibility that law enforcement might err does not make these important statutes "overbroad." Pornographers who prefer "barely legal" models – those who recently turned 18 and who look even younger – may be deterred in some instances, or they may find it advisable to surround their work with assurances of their subjects' adult status. Yet, so long as the statute's *prohibitory terms* do not reach too far, these collateral effects are not the sort of "chill" the overbreadth doctrine is designed to prevent.

[25] Such an instruction was given in the Black case, J.A. at 146, but not in Elliott's trial. O'Mara, of course, was not tried by a jury.

B. Under This Court's Overbreadth Jurisprudence, the Virginia Statute Is Not Overbroad.

This Court's overbreadth doctrine contains two components. The first component addresses standing, while the second provides substantive rules for evaluating the constitutionality of a statute. Under the traditional rule of standing, "constitutional rights are personal and may not be asserted vicariously." *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973). Thus, if a person's conduct may be constitutionally prohibited by statute, he is unable to challenge the statute on the grounds that the same statute might be applied unconstitutionally to someone else. *Id.* The overbreadth doctrine alters this traditional rule in certain limited circumstances. In the area of the First Amendment, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612. In other words, where the statute in question might chill speech protected by the First Amendment, those who are before the court have standing to challenge the statute on its face, even if their own conduct is not so protected. While the court below found respondents to have such standing, this is not where its error occurred.

Rather, the lower court erred on the second component – the substantive rules of overbreadth. The overbreadth doctrine is designed to invalidate statutes which, by their very terms, prohibit constitutionally protected expression *and* which do so routinely. Thus, in order for a statute to be so invalidated under this doctrine, "the overbreadth . . . must not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at

615 (emphasis added). This rule applies with particular force where, as here, "conduct and not merely speech is involved." *Id.* On both of these issues – whether overbreadth is real and whether it is substantial – the Virginia Supreme Court erred.

1. There Is No Real Overbreadth.

In order for overbreadth to be *real*, the statute's *prohibitory terms* must be so broad – or so vague – as to forbid expression that is constitutionally protected. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (holding that statute is overbroad "if in its reach it prohibits constitutionally protected conduct"); *Ferber*, 458 U.S. at 771 ("On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.") By its terms, the Virginia statute would not apply if someone burned a cross for some wholly innocent purpose. It applies *only* when the cross is burned with the intent to intimidate someone. There are *no* circumstances where such intimidation is constitutionally protected. *See R.A.V.*, 505 U.S. at 388 ("[T]hreats of violence are outside the First Amendment."). Thus, the Virginia statute does not reach *any* protected expression. There is no real overbreadth.

2. There Is No Substantial Overbreadth.

Not every case of overbreadth is fatal. As the *Broadrick* Court explained, overbreadth analysis is "strong medicine" and should be applied "sparingly and only as last resort." 413 U.S. at 615. Indeed, before a statute will be invalidated under the overbreadth doctrine, the

overbreadth must be *substantial*. *Id.* at 613.[26] As this Court, speaking through Justice White, observed:

> The premise that a law should not be invalidated for overbreadth unless it reaches a *substantial number* of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.
>
> * * *
>
> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to *repeatedly* chill the exercise of expressive activity by *many* individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

Ferber, 458 U.S. at 771-72 (emphasis added). *See id.* at 772 n.27.

Here the Virginia Supreme Court gave no analysis for why it thought any perceived overbreadth was substantial. Indeed, there is no basis for any such conclusion. Even if the possibility of erroneous prosecutions played a role in overbreadth analysis, there is nothing to show that the

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[26] In *Broadrick*, Justice Brennan sought to wield the overbreadth doctrine more aggressively than the majority, dissenting there because he thought the Court should strike down the statute that the *Broadrick* majority decided to uphold. Yet, as Justice Brennan observed, the Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 413 U.S. at 630 (Brennan, J., dissenting).

number of such errors would be substantial under the Virginia statute. As the Florida Supreme Court held in rejecting an overbreadth challenge to that State's cross burning law: "Although one might be able to imagine a hypothetical situation wherein the statute could be impermissibly applied, the threat of overbreadth is speculative at best and is insufficiently substantial to invalidate the statute on its face." *T.B.D.*, 656 So. 2d at 482.[27] Here, too, the possibility that someone might burn a cross for reasons other than intimidation – and *also* be charged under the Virginia statute – is speculative at best. In challenging this statute under the overbreadth doctrine, respondents "bear the *heavy burden* of demonstrating that the [statute] forbids a substantial amount of valuable or harmless speech." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1410 (2002) (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part) (emphasis added); *Reno v. A.C.L.U.*, 512 U.S. 844, 896 (1997) (O'Connor, J., joined by Rehnquist, C.J., concurring in part and dissenting in part). Assuming *arguendo* that such possibilities might arise, it cannot be seriously suggested that "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ferber,* 458 U.S. at 773. Thus, to say that the Virginia statute is substantially overbroad is wholly without merit.

[27] *See also In re Steven S.*, 31 Cal. Rptr. 2d at 651, where the California Court of Appeals reached a similar result.

C. If the Presumption about Intent to Intimidate Renders the Statute Overbroad, Then This Court Should Sever the Presumption from the Remainder of the Statute.

If the Court agrees that the statute's prohibitory terms are constitutional – but concludes that the statutory presumption is not – the statute should not be stricken on its face. Instead, the presumption should be severed and the rest of the statute allowed to stand.[28] Severability is a question of state law. *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 509-10 (1993). The Virginia law in this area was recently explained by the Fourth Circuit:

> Virginia's General Assembly has enacted a statutory provision dealing with severability of sections of the Virginia Code. Section 1-17.1 of the Code provides that "the provisions of *all* statutes are severable unless . . . it is apparent that two or more statutes or provisions *must* operate in accord with one another." In other words, the Virginia legislature has stated clearly that courts are now to apply a presumption of severability unless two provisions of a statutory section *must* operate together.

Sons of Confederate Veterans, Inc. v. Comm'r, 288 F.3d 610, 627 (4th Cir. 2002) (emphasis in original). Thus, this Court

[28] In terms of relief for these respondents, this would mean, at most, that Black, who pled "not guilty," would be retried without the Commonwealth's having the benefit of the jury instruction regarding an inference of intent. J.A. 146. The conviction of O'Mara, who pled "guilty," would stand. So would the conviction of Elliott, who pled "not guilty" but whose jury did not receive an instruction based on the statutory presumption.

must apply a presumption of severability to the cross-burning statute's presumption of intent. There is no reason why such presumption of intent *must* operate in accord with the remaining prohibitory terms, especially since the presumption of intent was not added until sixteen years after the original enactment. 1968 Va. Acts ch. 350. Thus, if this Court finds the statutory presumption to be invalid under the overbreadth doctrine, it can be – and must be – severed from the rest of the statute. More importantly, however, there is no overbreadth. The statute is constitutional as written.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed.

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August 9, 2002

No. 01-1107

Supreme Court, U.S.
FILED
SEP 6 2002
CLERK

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

BARRY ELTON BLACK; RICHARD J. ELLIOTT; JONATHAN O'MARA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF ON MERITS FOR RESPONDENTS

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STATEMENT OF THE CASE

The Respondents Barry Elton Black, Richard J. Elliott, and Jonathan O'Mara were convicted of violating Virginia's cross-burning statute.[1] Barry Elton Black organized and led a Ku Klux Klan rally on August 22, 1998, in Carroll County, Virginia. The Klan rally was conducted on rural property with the permission of the landowner, who also participated in the rally. No one other than the participants in the rally was present on the property. The County Sheriff Warren Manning and his deputy Sergeant Richard Clark monitored the rally from an adjacent highway, to be sure that it would not get out of hand. J.A. 65, 70-71. A neighbor watched the rally from her porch. Several vehicles passed by the rally on the highway, and the occupants of one vehicle, an African-American family, briefly slowed to see what was going on, and then sped away. J.A. 97. During the rally the participants engaged in verbal attacks on various religious and racial groups, and on political figures, such as President Clinton and Hillary Clinton. J.A. 109. At the height of the rally a cross approximately 25 to 30 feet tall was ignited, visible from the highway, while the hymn *Amazing Grace* was played.

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[1] The statute reads:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

VA. CODE ANN. § 18.2-423 (1996).

At trial Virginia produced three witnesses against Black, the arresting Sheriff, the Sheriff's Deputy, and Mrs. Rebecca Sechrist, who watched the events from her adjacent property. The Sheriff testified that there were no overtly threatening gestures or signs made by members of the Klan at the rally, that there were no weapons observed to be present, and that he did not perceive any threat of imminent bodily injury to himself, or feel that he was going to be attacked. J.A. 78-79. Mrs. Sechrist testified at length regarding her reaction to the events, and in the course of that testimony she described her feelings as being "scared" and as feeling "awful" and "terrible." J.A. 110. Mrs. Sechrist's testimony is most fairly characterized, however, not as demonstrating any sense of fear of bodily injury directed to her, but rather as a more generalized loathing arising from her disgust with the Klan ritual.[2]

The prosecutions of Richard J. Elliott and Jonathan O'Mara arose from an incident in the City of Virginia Beach on May 2, 1998. James Jubilee, an African-American, was a neighbor of Elliott's. Jubilee complained to Elliott about the discharge of firearms in Elliott's backyard. After discussing Jubilee's complaint with O'Mara and a third person, David Targee, at a party at Targee's home, Elliott, O'Mara, and Targee hastily constructed a small wooden cross in Targee's garage. They went to Jubilee's home, planted the cross in his back yard, and lit the cross. Jubilee found the charred remains of the cross when he awoke the following morning.

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[2] J.A.110 ("Oh, it made me feel awful. It, they all walked around and then they would go in one circle and say things and then they would go around in another circle and say things and then they went up and all met at the bottom of the cross and lit it and played *Amazing Grace* and I tell you what, I was just, it was just terrible. It was terrible to see, that, when they were talking about random shooting black people and all, the guy that said it and everything talked about killing people and then get up there and said that when he died, he knowed, that he was a good Christian and when he died, he knowed he was going to heaven and then to burn the cross like that, I just, I just, I couldn't begin to put in words how I felt. I cried, I sat there and I cried. I didn't know what was going to happen between everything going on. It was just terrible.").

No one in the Jubillee family actually witnessed the burning of the cross.[3]

The Supreme Court of Virginia heard oral argument in all three cases on the same day, and in a consolidated opinion reversed all three convictions, holding that the Virginia cross-burning statute was unconstitutional on its face. *Black v. Commonwealth of Virginia*, 262 Va. 764, 553 S.E.2d 738 (2001), J.A 269.

SUMMARY OF ARGUMENT

Virginia's cross-burning law discriminates on the basis of content and viewpoint within the meaning of this Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Content and viewpoint discrimination may reside in laws that target a particular symbol, such as the cross, or a distinct expressive ritual, such as the burning of the cross, whether or not the statute additionally uses language to single out any specific ideological viewpoint. To deny that a law targeting a symbol may be content- or viewpoint-based is to deny the central role that symbols play in human communication, and the central place of symbolic speech in First Amendment jurisprudence. If the government is permitted to select one symbol for banishment from public discourse there are few limiting principles to prevent it from selecting others. And it is but a short step from the banning of offending symbols such as burning crosses or burning flags to the banning of offending words.

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[3] Pursuant to a plea agreement, O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, and was sentenced to 90 days in jail and a $2500 fine on each charge, with part of the time and fines suspended. Under the plea agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross-burning law. Elliott was also charged with attempted cross-burning and conspiracy to commit cross-burning. Upon his plea of not guilty, a jury found him guilty of attempted cross-burning, but not guilty of conspiracy. Elliott was sentenced to 90 days in jail and was fined $2500.

The "intent to intimidate" provision of the cross-burning statute does not cure the content and viewpoint discrimination. Nor is the law saved merely because it does not discriminate among speakers, or was not enacted exclusively to suppress the Ku Klux Klan or its agenda. The inquiry into whether a law is content-based or viewpoint-based does not focus on the ultimate objective of the government, but on a more immediate and visible question, which is whether the *means* of regulation is related to the content of expression. Try as it might, Virginia cannot take the burning cross out of its cross-burning law, or escape the plain fact that it is Virginia's concern with the communicative impact of cross-burning that animates the statute's existence.

Virginia has adequate content-neutral alternatives to accomplish its objectives. The First Amendment does not protect threats or intimidation. Neutral laws proscribing intimidation exist in Virginia, and throughout the nation, and may in appropriate circumstances be invoked to prosecute cross-burning. Similarly, hate *crime* laws are constitutional, such as laws that enhance penalties for crimes (including threats or intimidation) motivated by racial animus or other biased intent. The focus here is not on the *act* of cross-burning, which may in appropriate circumstances be punished by society, but on the nature of the *laws* under which cross-burning may be prosecuted. As this Court observed in *R.A.V.*, the government has "sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 505 U.S. at 396.

The cross-burning law cannot be defended under any "exception" to the First Amendment principles emanating from *R.A.V.* It is not targeted at the "secondary effects" of cross-burning. Nor can it be defended simply as an "especially virulent" form of intimidating speech, or as an example of a subclass of speech proscribed for the same

reasons that the general class of threatening or intimidating speech may be proscribed.

The prima facie evidence provision of the statute compounds its unconstitutionality, exacerbating its content and viewpoint discrimination, enabling Virginia to obtain convictions through shortcuts the First Amendment does not allow, and operating as an *in terrorem* prosecutorial threat that chills a substantial range of constitutionally protected expression, rendering it overbroad.

A central distinction in modern First Amendment law is the line that divides mere "abstract advocacy" from actual lawless action. In dealing with the relationship between violent speech and violent action, modern First Amendment jurisprudence employs a variety of legal doctrines that work in essentially parallel ways to separate mere violent rhetoric from speech closely intertwined with violence. The incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the "fighting words" doctrine as it has now been narrowed through holdings such as *Cohen v. California*, 403 U.S. 15 (1971), and the "true threat" doctrine of *Watts v. United States*, 394 U.S. 705 (1969), all operate in much the same fashion, working in combination to protect violent or offensive rhetoric while permitting the government to move against speech connected in some more direct and palpable sense to violent conduct.

The core flaw of the prima facie evidence provision is that it short-circuits this central First Amendment distinction, effectively extracting the teeth from the intent to intimidate, transforming the intent element into a "now you see it now you don't" requirement. Under the Virginia statute, law enforcement officers, prosecutors, trial judges, and juries are instructed that nothing beyond the mere burning of the cross is *required* to sustain an arrest, prosecution, or conviction. This affronts the First Amendment in a deeply offensive way, permitting the government to "brand" certain speech as presumptively

taboo in public discourse, attaching legal penalties to its mere utterance or display.

ARGUMENT

I. THE VIRGINIA CROSS-BURNING LAW DISCRIMINATES ON THE BASIS OF CONTENT AND VIEWPOINT

A. The Central Place of Symbolic Expression in First Amendment Jurisprudence

Out of all the objects in the world that might be set on fire, Virginia's cross-burning law selected only a burning cross for unique treatment. At the highest level of abstraction a cross is an object or symbol of a particular shape: a vertical pole traversed by a horizontal bar. There certainly is nothing in this geometric configuration of the vertical and horizontal that carries any peculiarly dangerous potency. It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court struck down an ordinance of St. Paul Minnesota that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380, *quoting* St. Paul, Minn. Legis. Code § 292.02 (1990). This Court held that "the ordinance goes even

beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 391.

When distilled to its essence, Virginia's position is that viewpoint and content discrimination exist only in laws that single out an identifiable perspective on the ideological or political spectrum. Virginia thus views this Court's condemnation of content-based and viewpoint-based discrimination is *R.A.V.* as residing *exclusively* in the language of the St. Paul ordinance requiring that the symbolic speech (such as burning a cross) be of the type "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 380.

Content and viewpoint discrimination, however, may reside in laws that target a specific symbol, such as the cross, or a specific expressive ritual, such as the burning of the cross. To deny that a law targeting a symbol may be content- or viewpoint-based is to deny the central role that symbols play in human communication, and the central place of symbolic speech in First Amendment jurisprudence:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. . . .

> A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943).

Certain symbols--the American Flag, the Star of David, the Cross, the swastika--exude powerful magnetic charges, positive and negative, and are often invoked to express beliefs and emotions high and low, sublime and base, from patriotism, faith, or love to dissent, bigotry, or hate. Symbolic expression is often combined with group expression, such as sit-ins, meetings, marches, or rallies. *See, e.g, Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966) (civil rights sit-in to protest segregation); *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14 (1968) (labor picketing); *United States v. Grace*, 461 U.S. 171, 176 (1983) (striking down law prohibiting displaying in the Supreme Court building or on its grounds any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement). Symbolic expression may be relatively simple and passive, such as the wearing of a black armband to protest the war in Vietnam. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (sustaining First Amendment right of student to wear armband at school). Quite often, however, symbolic expression is far more incendiary and graphic. Symbolic expression may involve either the consecration or the desecration of a symbol. A flag may be proudly waved or angrily defiled, a cross may be reverently worshiped or wrathfully burned. The destruction or defilement of a symbol is often the method through which a speaker communicates the intensity of the message, which may

frequently be a message defiant of authority or disrespectful of mainstream values and sensibilities.[4]

If this Court were to draw a distinction between the St. Paul ordinance struck down in *R.A.V.* and the Virginia cross-burning statute, a dramatic and dangerous rift would suddenly be created in First Amendment law, a rift treating articulated verbal content discrimination (such as that in *R.A.V.*) as different *in kind* from symbolic content discrimination. Symbolic expression would thereby be rendered a second-class First Amendment citizen. Decades of First Amendment cases are aligned against any such move.[5]

Cross-burning is a shorthand, as all symbolic speech is a shorthand, speaking heart-to-heart and mind-to-mind. The central principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint, and this principle is as important in the context of symbols as it is in the context of language. Cross-burning, like flag-burning, is undoubtedly offensive and

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[4] *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (striking down conviction for burning the American flag); *United States v. Eichman*, 496 U.S. 310 (1990) (same); *Schacht v. United States*, 398 U.S. 58 (1970) (sustaining right of actor to wear army uniform in anti-war theatrical presentation staged in front of a recruiting center); *Stromberg v. California*, 283 U.S. 359 (1931) (striking down conviction for displaying of red flag to protest against government); *Smith v. Goguen*, 415 U.S. 566 (1974) (striking down conviction for treating flag contemptuously by wearing pants with small flag sewn into their seat); *Spence v. Washington*, 418 U.S. 405 (1974) (First Amendment protected display of flag with peace symbol superimposed upon it).

[5] *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.").

disturbing to most citizens. Yet "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also United States v. Eichman*, 496 U.S. 310 (1990). The Constitution protects not only the analytic vocabulary of the mind but the inarticulate speech of the heart. *See Cohen v. California*, 403 U.S. at 26 ("much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.").

Virginia in effect claims that a burning cross has acquired a kind of "secondary meaning" in which it is routinely understood as an illegal threat of violence. But this is not trademark law. This is not the invocation of secondary meaning to avoid consumer confusion in the regulation of the sale of goods or services within the marketplace of commerce.[6] This is free speech law. This is the invocation of secondary meaning in the service of censorship, regulating traffic in one discrete expressive symbol within the marketplace of ideas.

Virginia seems to believe that it may browse the universe of symbols, passing laws targeting those it does not like. In the same section of its statutory code that contains the cross-burning law, for example, Virginia has enacted a

[6] *See Park 'N Fly, Inc., v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985).

provision, worded identically, targeting swastikas.[7] Yet a burning cross cannot be made a form of expressive contraband. The state cannot by fiat brand this one symbol as taboo, eliminating its use in social discourse. The government may no more single out a burning cross for especially disfavorable legal treatment than it may single out a burned or mutilated American flag, or the likeness of Osama bin Laden, or a swastika.

To go down the road suggested by Virginia would be perilous business, for if the government is permitted to select one symbol for banishment from public discourse there are few limiting principles to prevent it from selecting others. And it is but a short step from the banning of offending symbols such as burning crosses or flags to the banning of offending words. A word is, after all, but a symbol itself, "the skin of a living thought."[8]

B. The Intent to Intimidate Element Does Not Cure the Content and Viewpoint Discrimination

Virginia and its supporting *amici* incessantly repeat the mantra that the Virginia law requires an intent to

[7] A law may thus be judged by the company it keeps. In 1983 Virginia's cross-burning statute was amended to add a second prohibition, worded and structured identically to the cross-burning provision, but targeted at swastikas. VA. CODE ANN. § 18.2-423.1 (1996). ("It shall be unlawful for any person or persons, with the intent of intimidating another person or group of persons, to place or cause to be placed a swastika on any church, synagogue or other building or place used for religious worship, or on any school, educational facility or community center owned or operated by a church or religious body. A violation of this section shall be punishable as a Class 6 felony. For the purposes of this section, any such placing of a swastika shall be prima facie evidence of an intent to intimidate another person or group of persons.").

[8] *See Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

intimidate. But the point of *R.A.V.* is that it does not matter. A law banning "fighting words" is permissible, but not a law banning "racist fighting words." A law banning intimidation is permissible if the concept of "intimidation" is sufficiently confined, but not a law banning "intimidation-through-cross-burning." *R.A.V.* teaches that viewpoint-neutrality is a First Amendment prime, a dynamic requirement that cuts across all other First Amendment doctrines. *R.A.V.*, 505 U.S. at 391-92. The content and viewpoint discrimination in Virginia's cross-burning law inheres in the prohibition of cross-burning alone. Virginia's labored effort to convince this Court that the statute's exclusive focus on burning crosses is *not* content-based ultimately collapses on itself and dissolves into incoherence, for the statute only makes logical sense if it is construed as driven by Virginia's concern with *what is communicated* when a cross is burned.

Virginia's cross-burning law is not a criminal statute of general applicability, proscribing palpable conduct that causes or threatens physical harm without reference to any form of expression. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (sustaining penalty-enhancement hate crime law unrelated to expression). Nor is it a law enacted for reasons other than the communicative impact of a message, that has the mere incidental effect of chilling some forms of expression, the type of law that qualifies for intermediate scrutiny under the test of *United States v. O'Brien*, 391 U.S. 367 (1968). The difference between cases governed by decisions such as *Texas v. Johnson*, 491 U.S. 397 (1989) (flag-burning) or *R.A.V.* (cross-burning) and cases governed by *O'Brien* (draft-card burning) is the difference between content based and content-neutral regulation. When the government makes it a crime to burn a flag or burn a cross it is *only* concerned with what is communicated by such burning. When the government makes it a crime to burn a draft card it may plausibly cite reasons unrelated to what is

communicated, such as the orderly administration of the draft. *O'Brien*, 391 U.S. at 381-82.

Try as it might, Virginia cannot read the burning cross out of its cross-burning law. Even cross-burning laws that are otherwise constitutional violate the First Amendment simply and completely because they *are* cross-burning laws.[9] Any suggestion that cross-burning is *intrinsically* intimidating is wordplay.[10] It may well be that most Americans of good will are repulsed by the sight of a burning cross, as they are repulsed by the site of a burning flag. In a general sense, many persons might describe their emotions on seeing the sight of a burning cross (or other rituals of the Ku Klux Klan or similar groups) as filling them with "fear" or "loathing." Many might say that they feel "intimidated" or "scared" by such rituals, as did Mrs. Sechrist, a witness who testified in the Black trial. J.A. 110. Those who are members of groups that have been the special target of the Klan's bigotry or violence may well feel these emotions with special poignancy and intensity. Yet this is not the kind of disturbance from which citizens in this society may demand the law's shelter. Such "undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School District*,

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[9] *See State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993) (applying *R.A.V.* to strike down cross-burning law, stating that: "The State urges us to construe section 16-7-120 as proscribing 'fighting words.' We discern that we cannot cure the unconstitutionality of section 16-7-120 by such a construction. Like the Minnesota statute, section 16-7-120 does not completely prohibit the use of fighting words; rather, it prevents only the use of those fighting words symbolically conveyed by burning a cross. The government may not selectively limit speech that communicates, as does a burning cross, messages of racial or religious intolerance.").

[10] *See R.A.V.* 505 U.S. at 392-93 (1992) ("This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.").

393 U.S. at 508. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Much of the speech in an open society, particularly speech coming from the fringes, will be offensive, coarse, disturbing, or loathsome. Under our First Amendment traditions, however, the "fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Rather than censor the offending speaker, our Constitution requires the offended viewer to avert his eyes.[11]

C. The Statute's Speaker-Neutrality Does not Render it Content-Neutral

Virginia argues that the cross-burning statute is content- and viewpoint-neutral because it does not matter who burns the cross. This is fighting a straw-man, conflating content discrimination with speaker discrimination. In *Texas v. Johnson* this Court rejected this very argument, noting that the Texas statute at issue was inherently viewpoint-based, even though it applied evenly to any person or group who desecrated the flag, from whatever political perspective. *Texas v. Johnson*, 491 U.S. at 413 n.9. ("If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. . . . Thus, if

[11] *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (striking down ordinance seeking to keep certain sexually explicit films at drive-in movies "from being seen from public streets and places where the offended viewer readily can avert his eyes"); *Cohen v. California*, 403 U.S. 15, 21 (1971) (striking down conviction for wearing vulgar "fuck the draft" message on a jacket in a public area because offended viewers could "effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint."). That Virginia's law reaches all cross-burning thus does not mitigate the offense to the First Amendment. Americans have the right to use symbols freely to communicate, to wave flags or trample on them, to worship crosses or burn them.[12]

On this point the opinion for the Supreme Court of Virginia written by Justice Donald Lemons evidenced deep concern for a contradiction that runs inherently and pervasively throughout Virginia's argument. *Black v. Commonwealth of Virginia*, 262 Va. 764, 776, 553 S.E.2d 738, 745 (2001), J.A 282. Virginia repeatedly insists that the history of concern with Ku Klux Klan violence that indisputably precipitated passage of the law does not render the law content or viewpoint based, because the naked text of the law reaches *all* cross-burning. Yet Virginia's insistence that cross-burning and intimidation are essentially equivalent, so that cross-burning is deemed either inherently intimidating, or at least usually intimidating, is based entirely on Virginia's invocation of our societal experience with cross-burning, and principally with cross-burning as a ritual practice of the Ku Klux Klan. The Supreme Court of Virginia cogently observed that the State "cannot have it both ways," ignoring the history of cross-burning in one part of its argument and invoking it in the next. *Id.*

[12] *See also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995)("[E]ven though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech"); *Boos v. Barry*, 485 U.S. 312, 319 (1988) ("we have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'") *quoting Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980).

Virginia's history, of course, is far from unique. Cross-burning has long been a well-recognized ritual of the Ku Klux Klan, a symbol with intense political and religious resonance, often communicating hatred. Justice Thomas explained the symbolic significance of cross-burning in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), and his observations are worth considering here at length:

> In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning. Cross burning was entirely unknown to the early Ku Klux Klan, which emerged in some Southern States during Reconstruction. W. Wade, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 146 (1987). The practice appears to have been the product of Thomas Dixon, whose book *The Clansman* formed the story for the movie, THE BIRTH OF A NATION. See M. Newton & J. Newton, THE KU KLUX KLAN: AN ENCYCLOPEDIA 145-146 (1991). In the book, cross burning is borrowed from an "old Scottish rite" (Dixon apparently believed that the members of the Reconstruction Ku Klux Klan were the "reincarnated souls of the Clansmen of Old Scotland") that the Klan uses to celebrate the execution of a former slave. T. Dixon, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN 324-326 (1905). . . To be sure, the cross appears to serve as a religious symbol of Christianity for some Klan members. The hymn "The Old Rugged Cross" is sometimes played during cross burnings. See W. Moore, *A Sheet and a Cross: A Symbolic Analysis of the Ku Klux Klan* 287-288 (Ph.D. dissertation, Tulane University, 1975). But to the extent that the Klan had a message to communicate in Capitol Square, it was primarily a political one. . . .Of course, the cross also had some religious connotation; the Klan leader linked the cross to what he claimed was one of the central purposes of the Klan: "to establish a Christian government in America." *Id.*, at 142-145. . . . The Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate.

Id. at 770-71 (Thomas, J., concurring). As this passage explains, the burning cross is often a *tool* for intimidation and harassment. No one disputes that. But it is not a tool in the same sense that a gun or a knife is a tool. The burning cross is a *symbol*, and as Justice Thomas in *Pinette* explained, it is a symbol with a variety of connotations relating to race, religion, politics, and prejudice.

Again it should be emphasized that neither Barry Elton Black, who is a Klan leader, nor Richard J. Elliott and Jonathan O'Mara, who have no affiliation with the Klan, claim that the constitutional infirmity of the Virginia cross-burning law resides in any deliberate intent by the Virginia legislature to suppress the Klan or its ideological agenda. Nor was this the holding of the Supreme Court of Virginia below. Rather, as the Supreme Court of Virginia correctly reasoned, the difficulty with the Virginia cross-burning statute is not that it is calculated to suppress the Ku Klux Klan or a message of white supremacy, but that it seeks to suppress one symbol laden with many communicative emanations and meanings. As the Supreme Court of

Virginia understood, the cross is not just any geometric shape, a vertical pole traversed by a horizontal bar. The cross is a symbol steeped in meaning, and cross-burning is a ritual steeped in expression.

The Supreme Court of Virginia thus correctly emphasized that the cross-burning law focused on one form of symbolic speech, a burning cross, leaving other geometric configurations, such as circles and squares, untouched. *Black*, 262 Va. at 776, 553 S.Ed.2d at 745, J.A. 281. Somewhat derisively, the State chides the Supreme Court of Virginia on this issue, reasoning that the legislature cannot be faulted for failing to include all symbols. Brief of Petitioner at 30 ("Perhaps, someday, somewhere, somebody in Virginia may intimidate someone--and simultaneously express an idea--by burning some geometric shape other than a cross. But such speculation does not make the current law invalid.").

Respectfully, it is the State of Virginia, not the Supreme Court of Virginia, that misses the point. Of course Virginia did not make it a crime to burn a circle or square. And why not? Because such a law would have targeted mere impotent gibberish.[13] In our societal experience burning circles and squares have acquired no meanings; to burn them would be fury signifying nothing, to ban such burning would be a silly and meaningless legislative act. So too, Virginia's ban on cross-burning is an act of legislative nonsense *unless* it is interpreted as grounded in what is communicated when the cross is ignited. In noting the law's failure to include benign symbols such as squares and circles the Supreme Court of Virginia thus persuasively

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[13] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle. . . .").

underscored the verisimilitude of its judgment that the law was content-based.[14]

D. The Alleged Lack of an Ulterior Motive to Censor does Not Render the Statute Content- or Viewpoint-Neutral

Virginia's elaborate effort to cleanse the legislative history of its statute of any invidious intent to discriminate against particular ideas is simply irrelevant. This repeats an error that permeates Virginia's entire argument, an error that confuses the question of the government's ultimate goal, which may be legitimate and altruistic, with its regulatory method, which may be content-based or viewpoint-based despite the purity of its motives. *See Simon & Schuster, Inc., v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 117 (1991)("The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'"), *quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). It is thus not necessary to adduce "'evidence of an improper censorial motive'" in order to make the case that Virginia's cross-burning law is content-based. *Id., quoting Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

Virginia pushes a red-herring in its many ingenious attempts to explain its law as resting on something other

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[14] *Black*, 262 Va. at 776, 553 S.Ed.2d at 745, J.A. 281. ("In an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech--the burning of a cross. It did not proscribe the burning of a circle or a square because no animating message is contained in such an act.").

than "political correctness."[15] Whether Virginia's legislature in 1952 was or was not racist, or whether Virginia's legislature in 1952 did or did not single-mindedly seek to suppress the Ku Klux Klan, are simply issues that do not matter, if the *means* chosen by the legislators to accomplish their mix of objectives and motivations, whatever they may have been, was geared to the content of speech.[16]

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[15] When initially enacted in 1952 the statute could not have been motivated by a 1950s form of political correctness striving to suppress racism, Virginia argues, for the state legislature at the time was steeped in racial animus and committed to official segregation. Drawing on abortion protest cases, the State maintains that while it may well be that an uprise in cross burning incidents associated with the Ku Klux Klan did provide the political impetus for enactment of the law, and while members of the Ku Klux Klan then and now may be the persons most likely to be prosecuted under the law, the mere correlation between cross-burning and Klan activity does not render an otherwise neutral law unconstitutional.

[16] Indeed, from the perspective of 1952 it is quite possible that the cross-burning statute would not at the time have been construed as a violation of the First Amendment at all. Many of today's well-entrenched First Amendment principles and formal doctrines were not yet formed in the decisional law of 1952; from current perspectives free speech jurisprudence in 1952 was still relatively primitive. In 1952 this Court decided *Beauharnais v. Illinois*, 343 U.S. 250 (1952), upholding a criminal conviction for "group libel" against the leader of a racist Chicago organization known as the "White Circle League" merely for distributing racist leaflets. The Court's opinion, written by Justice Frankfurter, made oblique reference to the holocaust and Nazi Germany, stating that "Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community." *Id.* at 258-59 (*citing* Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 Col.L.Rev. 591, 725 (1938); David Reisman, *Democracy and Defamation*, 42 Col.L.Rev. 727 (1942). The Virginia cross-burning statute partakes to some degree of the "group libel" motif of *Beauharnais*, in its language referring to intimidation of "*any group* of persons." VA. CODE ANN. § 18.2-424 (emphasis added). While *Beauharnais* has never been explicitly overruled, and while isolated passages from the case are still occasionally cited in opinions of this Court, clearly constitutional law has

To avoid the force of this settled principle, Virginia invites this Court to import from its Establishment Clause jurisprudence a methodology akin to that at times used to determine whether a law was or was not enacted for a "secular purpose."[17] But as this Court has observed, "[t]he First Amendment protects speech and religion by quite different mechanisms." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). The Establishment Clause and the Free Speech Clause operate in different ways to accomplish different objectives. It is unsound to play First Amendment mix-and-match, borrowing isolated principles from religion cases such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in an attempt to reformulate the structure of free speech law. It is true that in Establishment Clause cases this Court often begins its inquiry by first determining whether the law at issue is supported by a valid secular purpose. In Establishment Clause cases the identification of a legitimate secular purpose does not render the law home free, however, but

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passed *Beauharnais* by. The holding in *Beauharnais* cannot be reconciled with a host of subsequent decisions, and the case has been effectively repudiated *sub silentio*. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (imposing First Amendment limitations on common-law libel actions); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down conviction for racist Ku Klux Klan speech indistinguishable from that in *Beauharnais*); *Cohen v. California*, 403 U.S. 15 (1979) (striking down conviction for wearing message "fuck the draft" on a jacket); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down conviction for flag desecration); *United States v. Eichman*, 496 U.S. 310 (1990) (same). *Beauharnais* was mentioned in passing in *R.A.V.* itself, which cited *Beauharnais* as an example of the *incorrect* view that certain categories of expression, such as obscenity or defamation, are not speech "at all," or that First Amendment protection does not any sense extend to them. *See R.A.V.*, 506 U.S. at 377 (expressing disagreement with the "occasionally repeated shorthand" that these are "categories of speech entirely invisible to the Constitution.").

[17] See Brief of Petitioner at 24-25 (relying on cases such as *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) and *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

merely advances the inquiry to the next stages of constitutional analysis. *Id.* at 612. In Speech Clause cases, in contrast, the underlying legislative purpose in an *ultimate* sense is rarely the principal focus, for the ulterior motive of the government is quite often legitimate, and indeed admirable, as when the ultimate goal is national security, or "law and order," or protection against violence, or compensation of crime victims. The inquiry into whether a law is content-based or viewpoint-based does not focus on this ultimate motive, but on a more immediate and visible question, which is whether the *means* of regulation employs devices that classify speech in reference to the content of its message. "It is not the State's ends, but its means, to which we object." *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

E. Many Adequate Content-Neutral Alternatives Are Available to Vindicate the State's Proffered Interests

In *R.A.V.* this Court observed that the government has ample content-neutral and viewpoint-neutral methods of vindicating the governmental interests that hate speech laws seek to vindicate. *R.A.V.*, 505 U.S. at 395-96. The same array of neutral options are available to accomplish the purposes that undergird cross-burning laws. Virginia has itself recently enacted a content-neutral alternative to its cross-burning statute, thus proving the point. Virginia in July 2002 added to its laws a content-neutral response to the decision of the Supreme Court of Virginia in *Black* with a new provision, codified at VA. CODE. ANN. § 18.2-423.01, that avoids any mention of cross-burning, but merely

reaches intimidation effectuated through the burning of "an object."[18]

There are no valid governmental interests underlying cross-burning statutes that cannot be vindicated through content-neutral criminal laws. Laws of general applicability, proscribing palpable conduct that incites or threatens physical harm do not violate the First Amendment. *See* VA. CODE ANN. § 18.2-60(A) (general law proscribing threats to kill or do bodily harm). Beyond that, under this Court's ruling in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), hate *crime* laws, singling out for special

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[18] This addition to Virginia's statutory code reads:

> A. Any person who, with the intent of intimidating any person or group of persons, burns an object on the private property of another without permission, is guilty of a Class 6 felony.
>
> B. Any person who, with the intent of intimidating any person or group of persons, burns an object on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury is guilty of a Class 6 felony.

VA. CODE. ANN. § 18.2-423.01. The passage of the new additional "burn any object" law did not render the Elliott, O'Mara, or Black convictions moot, nor did it moot the constitutional issue in any broader sense, because the new statute did not repeal or replace the existing cross-burning law, but instead created a new and additional statutory section, in an explicit reaction by the state legislature to the decision of the Supreme Court of Virginia in *Black v. Commonwealth*. The new "burn any object" law was codified in a different code section than the existing law, and the legislative history explicitly noted that it "[c]reates a new section without amending existing language in the current cross-burning statute. . . ." *See* Virginia General Assembly, HB 1173 "Summary as Passed" (2002).

punishment conduct undertaken out of biased motivation, are also constitutional.[19]

On this score the *amicus* Brief filed by the United States is illuminating. The United States devotes the bulk of its effort to explaining how the United States prosecutes acts of cross-burning under content-neutral federal statutes.[20] The Respondents accept as accurate the useful material submitted by the United States regarding the history of cross-burning in America. The Respondents also accept as sound the proposition that cross-burning, when conducted as an act of intimidation, threat, or incitement may be prosecuted under content-neutral state or federal laws such as those described by the United States.

The United States goes on to argue, however, that states should have additional authority to go beyond the federal model (a model duplicated in the laws of many states), and instead single out intimidation through cross-burning *as such*. Yet nothing in the arguments submitted by the United States, by Virginia, or by any of the State's supporting *amici* ever explains why neutral laws such as those employed by the United States or bias-motivation hate crime laws such as those approved by this Court in *Wisconsin v. Mitchell* will not do the trick.

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[19] In addition, under *Wisconsin v. Mitchell* the mere evidentiary use of speech to establish the biased intent is not unconstitutional. Thus the government could introduce evidence that a trespasser burned a cross, or brandished a swastika, as *evidence* of the biased intent required to establish a violation of hate crimes law. *See Wisconsin v. Mitchell*, 508 U.S. at 477 ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

[20] See Brief of the United States as Amicus Curiae at 13-20 (describing prosecutions under provisions of the Fair Housing Act, 42 § 3631, and the criminal conspiracy section of the federal civil rights statute, 18 U.S.C. § 241, which is often invoked in tandem with 42 U.S.C. § 1982, which secures certain rights against race discrimination in relation to real and personal property.

The sum is stated but not the math. Virginia's law is defended as an effort to combat threats and intimidation, but it is never explained why general threat and intimidation statutes, or laws that single out bias-motivated conduct alone (and do not mention expressive activity or target specific symbols) are not entirely adequate to accomplish the proffered government objectives. The United States, for example, concedes that the Virginia statute is different in kind from the federal model. See Brief of the United States as Amicus Curiae at 22 ("The Virginia statute, in contrast to the federal statutes discussed above, applies to a single mode of intimidating conduct, intimidation by cross-burning. Cross-burning is not in all instances an expressive activity. . . . But by focusing on a particular type of activity that often is expressive of an idea or viewpoint, the Virginia statute, although directed at conduct, may require scrutiny under the First Amendment in a way that the federal statutes do not."). Nevertheless, the United States advances no policy or legal arguments for *why* states need to single out "activity that is often expressive of an idea or viewpoint."[21]

No claim is made that content-neutral laws are failing. Indeed, one need only look to the sequence of litigation in *R.A.V.* itself to see that they are not. The perpetrators of the cross-burning incident at issue in *R.A.V.* were subsequently charged under federal statutes (18 U.S.C. § 241, and 42 U.S.C. § 3631) and their convictions were affirmed, *see United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994), precisely on the ground that the federal laws were content-neutral provisions making no mention of cross-burning or any other form of expressive activity.

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[21] See Brief of the United States as Amicus Curiae at 22-27. Neither the United States nor any other of Virginia's supporting *amici* offer any argument beyond that invoked by Virginia.

II. THE CROSS-BURNING STATUTE DOES NOT FALL WITHIN ANY "EXCEPTION" TO THE FIRST AMENDMENT PRESUMPTIONS AGAINST CONTENT AND VIEWPOINT DISCRIMINATION

A. It is Wrong to Interpret *R.A.V.* as Establishing Three Specific Exceptions to the Presumption Against Content and Viewpoint Discrimination

Virginia argues that even if its cross-burning law is construed as content- or viewpoint-based, the statute remains valid under three "exceptions" purportedly established in *R.A.V.* Virginia claims that its cross-burning law is justified under the "secondary effects" exception allegedly acknowledged in *R.A.V.*; that the law proscribes only an "especially virulent" form of intimidation, in which the "the content discrimination consists of the very reason the entire class of speech at issue is proscribable," *R.A.V.* 505 U.S. at 387; and in a catch-all argument, that "the nature of the content discrimination is such that there is no realistic possibility that suppression of ideas is afoot." *Id.* at 390. Virginia then proceeds to interpret the three alleged exceptions so expansively that the net effect is to entirely marginalize the central and vital First Amendment principles *R.A.V.* embraced.[22]

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[22] This interpretation of *R.A.V.* appears to have originated in a California state intermediate appellate court decision. *In re Steven S.*, 31 Cal.Rptr.2d 644, 651 (Cal. App. 1994). It is worth noting that in its *amicus* brief here, the State of California does not advance the view that *R.A.V.* is properly understood as stating a general rule with three definite exceptions, but rather advances a view similar to that advanced in this Brief, that the passage in *R.A.V.* from which these purported "exceptions" are drawn is better understood merely as articulating, with examples, a general justification for content-based discrimination within a class of proscribable speech. See Brief of Amicus Curiae State of California at 4, n.3.

Virginia's reading of *R.A.V.* is simplistic and erroneous, over-reading isolated passages, and turning the Court's explanatory discussions into hard-edged and stylized "exceptions" far more sweeping than any plausible reading of the case will bear. It trivializes the import of this Court's ruling in *R.A.V.* to reduce it to a sterile rule with three loopholes so elastic that they utterly undermine the integrity of the rule. More significantly, Virginia's argument fails to comprehend the gist of the real issue faced by the Court in *R.A.V.*, and the relationship of that issue to the flow of First Amendment doctrine that proceeded the *R.A.V.* opinion.[23]

B. The "Secondary Effects" Doctrine has No Place Here

This Court's discussion in *R.A.V.* of the "secondary effects" doctrine was not, as Virginia claims, an "exception" to the presumptive rule against content and viewpoint discrimination, but rather a discussion by this Court of the "secondary effects" doctrine as an example of content-neutral laws, a discussion intended as a *foil* for the kind of content and viewpoint discrimination struck down in *R.A.V.* Virginia's claim here that its cross-burning law reaches only "secondary effects" is an attempt to extend the secondary effects doctrine in a manner this Court has clearly rejected. Once again Virginia confuses ulterior motive with surface means. The secondary effects doctrine of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and its progeny is grounded in the supposition that regulation of sexually-oriented adult establishments may be justified because such businesses

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[23] It should be noted here that the entire discussion in *R.A.V.* regarding content-based subclasses of otherwise proscribable speech is technically *dicta*. This point is made not to diminish its importance, but to further emphasize that it is inappropriate to treat the Court's explanatory discussion as intended to authoritatively address (let alone resolve) conflicts presented by every future wrinkle in which the issue might again arise.

often attract other social ills such as crime or prostitution. *See, e.g., Renton*, 475 U.S. at 47-49; *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728, 1734 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298-99 (2000). The secondary effects doctrine therefore posits that the social harm at which the government regulation at issue is aimed flows not from the communicative impact of the speaker's message, but from harms extraneous to that communicative impact, harms that tend to correlate with certain types of speech activity.

When the communicative impact of the expressive activity is what causes the alleged harm, however, the secondary effects doctrine may not be invoked. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) ("We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. . . .The statute now before us burdens speech because of its content; it must receive strict scrutiny."); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 535, 574 (2001) (Thomas, J., concurring)("[T]he ordinance in *Renton* was aimed not at expression, but at the 'secondary effects' caused by adult businesses. The regulations here are very different. Massachusetts is not concerned with any 'secondary effects' of tobacco advertising--it is concerned with the advertising's primary effect, which is to induce those who view the advertisements to purchase and use tobacco products."). Plainly, it is the communicative impact of a burning cross that allegedly engenders intimidation. Virginia's entire case is otherwise incoherent. The secondary effects doctrine simply has no place here.

C. The Cross-Burning Law Cannot be Saved as a Regulation of "Especially Virulent" Intimidation

In an remarkable passage, Virginia in its Brief actually places in bold typeface the "message" that it claims is communicated by cross-burning.[24] Virginia then argues that because this message, apparently endemic to cross-burning, is "especially virulent," the State is entitled to ban it under an "exception" in *R.A.V.* supposedly approving of content or viewpoint discrimination for such especially dangerous messages.

This completely mis-reads *R.A.V.*, both on its own terms, and against the backdrop of its place in the evolution of this Court's First Amendment doctrines. To place *R.A.V.* in its proper context, it is important at the outset to recognize that this Court was confronted in that case with an argument that certain categories of expression are *entirely* outside the protection of the First Amendment. This categorical approach, which the Court in *R.A.V.* appropriately labeled "a simplistic, all-or-nothing-at-all approach to First Amendment protection," *id.* at 384, dated back to a famous passage in *Chaplinsky v. New Hampshire*,

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[24] See Brief of Petitioner at 35. ("The Message of a cross burning is this: ***We may kill you, or hurt you badly. Believe it. We have already come to your home, and we have done this hateful and dangerous thing in front of you. So, we don't just talk. We act. Next time we may torch your home. Or bomb your car. Or shoot into your windows. No one stopped us when we burned the cross. No one will stop us next time either. Fear us.***"). Virginia's claim that this is what cross-burning means is astonishing in many respects. To begin, there is nothing in the record in the Black, Elliott, or O'Mara cases to support the proposition that this is what either of the two cross-burning episodes in contest here communicated. Secondly, Virginia's statement is a manifest admission that it *is* the communicative impact of cross-burning (whatever that impact may be) that the law seeks to regulate, an admission that simultaneously exposes the law as content-based and disqualifies it from the shelter of any plausible "exception" recognized in *R.A.V.*

315 U.S. 568, 572 (1942). In words that are often quoted, the Court in *Chaplinsky* stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72. This passage from *Chaplinsky* seemed to invite a mechanical approach to all First Amendment problems, creating a "list" of taboo categories. Speech falling within one of the categories was not protected at all by the First Amendment, speech not falling within one of the categories was.

This Court in *R.A.V.* was forced to contend with the categorical approach that had descended from *Chaplinsky* because the Minnesota Supreme Court had construed the statute in *R.A.V.* as limited to "fighting words," and thus as falling within a class of proscribable speech. If the St. Paul ordinance fell within the "fighting words" category, the argument went, then it was completely *immune* from First Amendment attack, essentially "invisible" to the Constitution. It was against this backdrop that the Court in *R.A.V.* went to such elaborate length to reconcile the often repeated language from *Chaplinsky* with the far more complex and protective understanding of First Amendment

principles that had evolved since *Chaplinsky* was decided in 1942. In the course of that discussion the Court repudiated the mechanistic "all-or-nothing-at-all" approach, describing it as "no more literally true than is the occasionally repeated shorthand characterizing obscenity as 'not being protected at all.'" *R.A.V.*, 505 U.S. at 383.

This Court's rejection of the categorical approach to First Amendment law in *R.A.V.* was undoubtedly sound, and ought not be revisited. The *Chaplinsky* method invites a mere surface manipulation of labels, entirely failing to engage the competing interests posed by the many and various conflicts that arise in modern free speech cases. And purely as a descriptive matter, the *Chaplinsky* methodology cannot be reconciled with the large body of cases that have been decided since, cases that have consistently found that First Amendment protection *does* extend, at least in part, to speech nominally falling within one of *Chaplinsky*'s categories. Sexually explicit material that might fairly be described as "lewd and obscene" now receives substantial First Amendment protection, depending on the circumstances and method of regulation,[25] speech that is merely "profane" in the sense of being vulgar or blasphemous is now recognize as entirely protected,[26] speech that is "libelous" now receives vast First Amendment protection, particularly when it involves public officials or public figure plaintiffs or issues of public concern,[27] and the "fighting words" doctrine, while still

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[25] *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment'") (*quoting Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting private possession of obscene material in the home).

[26] *See, e.g,, Cohen v. California*, 403 U.S. 15 (1971); *Joseph Burstyne, Inc. v. Wilson*, 343 U.S. 495 (1952); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[27] *See, e.g,, New York Times Co. v. Sullivan*, 376 U.S. 354 (1964).

alive, has been significantly honed and narrowed by being brought into harmony with the highly protective intent and immediacy standards emanating from cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

If the categorical "all-or-nothing-at-all" approach was demonstrably unsound, however, merely announcing that proposition was not enough to dispose of the problem posed by *R.A.V.*, for the Court still had to confront the fact that the Minnesota Supreme Court had, after all, placed the St. Paul Ordinance within what appeared to be a narrow and thus constitutionally acceptable definition of "fighting words." It was here that *R.A.V.* added its own important elaboration to First Amendment doctrine, announcing that the powerful First Amendment presumptions against content and viewpoint discrimination apply even to speech falling within a category of speech that may otherwise be proscribed. What was so powerful about this Court's ruling in *R.A.V.* was its holding that even if the law were otherwise valid as a proscription against incitement or "fighting words," it could still be unconstitutional if infected with content or viewpoint discrimination. *R.A.V.*, 505 U.S. at 390-96.

In explaining its position, however, there was still work to do, for the proposition embraced by the Court in *R.A.V.* seemed to be in tension with a number of First Amendment principles that appeared to permit the drawing of content-based lines to define subclasses of proscribed speech within the boundaries of larger categories of permissible proscription. It was in the context of this seeming contradiction that the Court explained, first, that speech falling within proscribed classes was not "invisible" to the Constitution, and second, that examples of *permissible* discrimination within the parameters of a proscribed class were highly limited, and were always confined *either* to lines drawn on the basis of the same criteria that justified proscribing speech in the larger class, or to lines that were

not in fact content-based (such as lines drawn under the "secondary effects" doctrine).

It was thus in the course of this explanation that the Court embarked on its discussion of classes and subclasses of proscribable speech, establishing the crucial distinction between the use of content in a manner that is gratuitous in relation to the rationale justifying proscription of the entire class, and the use of content in a manner that merely applies the identical rationale to some narrower set of circumstances. This was the whole point of the insistence in *R.A.V.* that merely because speech happens to fall within a class that is traditionally viewed as proscribable (such as obscenity, or defamation, or fighting words) it does not thereby become "speech entirely invisible to the Constitution." *Id.* at 383. Instead, such speech *remains* visible to the Constitution, and the strong constitutional prohibitions against content and viewpoint discrimination. Such speech loses its constitutional protection *only* for reasons that are in full alignment with the rationale that justified proscription in the first instance.

The flaw here in Virginia's reading of *R.A.V.* is its failure to comprehend what this Court meant when it stated, in a pivotal passage:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

R.A.V., 505 U.S. at 388. The key to understanding this passage is its requirement that the "basis for the content

discrimination consists *entirely of the very reason* the entire class of speech at issue is proscribable." *Id.* (emphasis added). What *R.A.V.* requires is complete continuity between the line drawn to define the subclass and the line drawn to define the broader class. What *R.A.V.* forbids is discontinuity.[28]

There are, as *R.A.V.* acknowledged, some categories of speech that are proscribed at least in part *because* of their content. Under the regime of *Miller v. California*, 413 U.S. 15 (1973), for example, obscenity is deemed proscribable because of its content, including its prurience, offensiveness, or lack of serious redeeming value. The same may be said of the law of defamation.[29] This Court in *R.A.V.* carefully explained that there is nothing offensive to the First Amendment in laws that *narrow* the reach of obscenity or defamation by using criteria "entirely the same" as those used to define those categories of speech generally. What *R.A.V.* emphatically insisted, however, was that the government *not* make these categories "vehicles for content discrimination unrelated to their distinctly proscribable content." *R.A.V.*, 505 U.S. at 383-84. Thus a "State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience--i.e.*, that which involves

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[28] *R.A.V.*, 505 U.S. at 385 ("nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses--so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."), citing *Texas v. Johnson*, 491 U.S. at 406-407.

[29] Defamation doctrines would be incomprehensible without reference to content distinctions, such as whether the allegedly defamatory material is opinion or fact, true or false, merely mocking or actually injurious to reputation. *See, e.g., Milkovich v. Loraine Journal Co.*, 497 U.S. 1 (1990) (requiring that speech be factual); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (imposing burden of proving falsity on plaintiffs in cases involving issues of public concern); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (striking down award of damages for infliction of emotional distress when material contained no false fact injurious to reputation).

the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." *Id.* at 388. So too, "the government may proscribe libel but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Similarly, the government could choose to criminalize only those threats of violence that are directed against the President, "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Id.* at 388 (*citing Watts v. United States*, 394 U.S. 705, 707 (1969)). However, the Court observed, the government "may not criminalize only those threats against the President that mention his policy on aid to inner cities." *R.A.V.*, 505 U.S. at 388.

Once the dichotomy between subclasses defined in parallel to the defining characteristics of the broader class and subclasses defined for reasons extraneous to those characteristics is understood, the constitutional defect in Virginia's cross-burning law is rendered apparent. As *R.A.V.* itself made clear, the rationale for permitting the proscription of speech falling within the class of "true threats" is to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.* at 388.

The cross, however, is a communicative symbol, highly charged with religious, historical, social, and political meanings. The burning of a cross, like the burning of the flag, or the effigy of a political leader, intentionally plays on those religious, historical, social, and political meanings to add emotional and psychological intensity to the message, a message likely to be seen by many onlookers as perversion, blaspheme, or sacrilege. Admittedly, it may also be seen, in

a given time and place, as a true threat. But it cannot plausibly be maintained (as the United States, for example, admits) that *every* act of cross-burning is a threat.[30] Virginia's law thus does not merely define a subclass partaking of elements generic to all threats, but rather instead introduces a further content distinction, the burning of one symbol heavily laden with expressive connotations and meanings.

To put the point another way, compare a law targeting threats against the President with a law targeting threats accomplished through cross-burning. The two are not equivalent. The law targeting threats against the President creates a subclass within the broad category of threats geared to the *identity* of the intended victim--the President--and grounded in the policy judgment that such a threat is especially dangerous and damaging to the polity. The presidential threat law contains no additional and gratuitous reference to any particular symbol or message; it bans all threats directed one identified victim. Indeed, the law does not target expression *as such*, but merely targets the conduct of threatening a specific target, the President. That speech might be used to establish a violation of the law is merely an application of the principle that the mere evidentiary use of speech to establish illegal intent does not violate the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. at 477. A cross-burning law, in contrast, does not focus

[30] Virginia at times seems to echo this concession. With regard to its prosecution of Barry Elton Black, Virginia repeatedly makes the point that it would have been permissible for Black and his fellow Klan members to burn their cross if they had selected a spot on the farm from which the burning cross would not have been visible to others. Virginia seems to be saying that expression is fine, as long as nobody sees it.

exclusively on intent, or on victim-identity, but on the invocation of a specific symbol.[31]

D. The Law is Not Saved on the Theory that it was Not Passed to Suppress Ideas

In a final catch-all argument, Virginia claims that under *R.A.V.* content and viewpoint discrimination are excusable when, in the words of *R.A.V.*, "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Virginia's understanding of this isolated passage in *R.A.V.* is that as long as its *underlying* motivations were the altruistic goals of sheltering citizens from fear and maintaining law and order, the law is constitutional. If this is all that *R.A.V.* means, it means nothing. If this were what *R.A.V.* held, the case would have come out the other way.

Virginia's final catch-all argument is a reprise of the position it advances throughout its Brief. While Virginia and its supporting *amici* cast their arguments under the rubric of many different First Amendment doctrines, at their core they all loop back on the same rationales and fail for the same reasons. The pivotal question here, cutting across all the different legal arguments promoted by Virginia and its *amici*, is whether the statute's focus on cross-burning is sufficient to render it content-based or viewpoint-based.

The truism that threats are not protected by the First Amendment just does not dispose of this case. And however much the Virginia protests, under our First Amendment traditions to single out for special treatment one symbol in this manner *does* pose a danger that suppression of ideas is afoot. When a legislative body uses

[31] Thus if a new presidential threat law were enacted, which made reference to some specific symbol or message, targeting, for example, threats against the President carried out in the name of Islam, or through the use of a swastika, or by the use of a burning cross or a burning flag, such a law would run afoul the viewpoint-neutrality principle of *R.A.V.*

language to define its expressive target, it is relatively simple to locate and identify with precision the nature of the offending viewpoint discrimination. When a legislative body uses a *symbol* to define its expressive target, the nature of the viewpoint discrimination is often less determinate, as symbols themselves are often less determinate, conjuring up a wider range of meanings. Yet the First Amendment reaches both forms of discrimination. Virginia's cross-burning law stands in no better constitutional position than would a law prohibiting intimidation through flag-burning. The First Amendment does not permit Virginia to reify revulsion and outrage, bringing into play the punitive machinery of its criminal law to silence a message most citizens find disturbing or upsetting. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech. *"Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). *See also Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (same).

We have staked our fortune and future in this country on the transcendent value of freedom of speech, and the wisdom "that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring). Our First Amendment tradition rests on the faith that tolerance fosters resiliency, that the open venting of inflamed expression displaces more violence than it triggers, and that free speech dissipates more hate than it stirs.

The fitting remedy for disturbing messages of racial hatred are the healing messages of racial tolerance. As Justice Oliver Wendell Holmes admonished, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with

death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams v. United States*, 250 U.S. at 630 (Holmes, J., dissenting). Virginia's cross-burning law strikes at the heart of these First Amendment principles.

III. THE PRIMA FACIE EVIDENCE PROVISION VIOLATES THE FIRST AMENDMENT

A. The Prima Facie Evidence Provision Operates as an *In Terrorem* Chill on Protected Expression that Renders it Overbroad

The prima facie evidence provision of the Virginia cross-burning statute multiplies the unconstitutionality of the law in numerous ways. The provision exacerbates the content and viewpoint discrimination embedded in the statute, it enables the State to obtain convictions through shortcuts the modern First Amendment does not allow, and it operates as an *in terrorem* prosecutorial threat that chills a substantial range of constitutionally protected expression, rendering it overbroad.[32]

In its discussion of the prima facie evidence provision, the Supreme Court of Virginia observed: "It is not simply the prospect of conviction under the statute that renders it overbroad. The enhanced probability of

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[32] Virginia in the final two pages of its Brief argues that if this Court does find the prima facie evidence provision of the cross-burning statute unconstitutional, it should sever that provision of the statute from the main body of the law. Virginia did not make this argument for severance in the Supreme Court of Virginia, and under the normal practices of this Court the argument has been waived. Moreover, severance here would be a judicial act undertaken in an abstract vacuum, for it would not alter the outcomes of the cases or controversies before this Court. *These* defendants were convicted under the statute *as written*. Obviously they cannot be convicted under a new statute rewritten *nunc pro tunc* by this Court and applied against them retroactively.

prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad." *Black v. Commonwealth of Virginia*, 262 Va. 764, 777, 553 S.E.2d 738, 746 (2001), J.A 284. The Supreme Court of Virginia thus deemed the statute overbroad *both* because of the prospect of conviction (the issue that took up the bulk of the Court's substantive discussion in the main part of its opinion, dealing with *R.A.V.*), and because of the enhanced prospect of prosecution.

The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted."). As the Supreme Court of Virginia held:

> [T]he act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief. That the trier of fact ultimately finds the actor not guilty of the offense is little consolation after arrest and prosecution for speech or expressive conduct that is otherwise protected. Arrest for, and prosecution of, otherwise protected speech, with no evidence of a critical element of the offense other than a statutorily supplied inference, chills free expression.

Black v. Commonwealth of Virginia, 262 Va. 764, 778, 553 S.E.2d 738, 746 (2001), J.A 284-85. Although Virginia derides its Supreme Court on this point, the Court's argument is both entirely sound as doctrine and eminently resonate as

theory. Very much the same argument was adopted, in a different statutory context, by this Court in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), in which it confronted the claim that a federal statute banning "virtual" child pornography merely operated as a burden-shifting device, leaving defendants free to extricate themselves by proving that the speech at issue was not unlawful. This Court found that such a process turns the First Amendment on its head, largely because a defendant must face the chilling effect of prosecution and potential felony conviction unless able to prove that his conduct in fact falls outside the prohibition. *Id.* at 1404. ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.").

B. The Prima Facie Evidence Provision Violates the Procedural Principle Established in *Stromberg v. California* Prohibiting General Verdicts that May have Been Based on Protected Symbolic Expression

The constitutional defect in the prima facie evidence provision is further illuminated by one of the earliest symbolic speech cases decided by this Court, *Stromberg v. California*, 283 U.S. 359 (1931), striking down a conviction under a California statute that made it a crime to display a red flag as an emblem of opposition to organized government or as an invitation to anarchy or sedition. The Court in *Stromberg* assumed that the First Amendment does permit "the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Id.* at 369. The jury in the case, however, had been

instructed that they could convict the defendant Yetta Stromberg not merely for having engaged in such unprotected activity, but also for display of her red flag "as a sign, symbol, or emblem of opposition to organized government." *Id.* The Court found this constitutionally offensive, because it might be construed to include a proscription on peaceful and orderly opposition to government. *Id.* Because it was impossible to discern from the jury's general verdict whether the jury's determination of Stromberg's guilt rested on a finding of genuine incitement or threats of violence, or instead on the mere brandishing of the symbol of opposition alone, the Court held that the entire conviction must be overturned. *Id.* at 367-68.

C. The State May Not Through Fiat Brand a Specific Symbol as Presumptively Crossing the Constitutional Line that Separates Abstract Advocacy from Lawless Action

A central distinction in modern First Amendment law is the line that divides mere "abstract advocacy" from actual lawless action. In dealing with the relationship between violent speech and violent action, modern First Amendment jurisprudence employs a variety of legal doctrines that work in essentially parallel ways to separate mere violent rhetoric from speech closely intertwined with violence. The incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the "fighting words" doctrine as it has now been narrowed through holdings such as *Cohen v. California*, 403 U.S. 15 (1971), and the "true threat" doctrine of *Watts v. United States*, 394 U.S. 705 (1969), all operate in much the same fashion, working in combination to protect violent or offensive rhetoric while permitting the

government to move against speech connected in some more direct and palpable sense to violent conduct.[33]

The core flaw of the prima facie evidence provision is that it short-circuits this central First Amendment distinction, compounding the content and viewpoint discrimination by extracting the teeth from the required element of intentional intimidation, rendering it a "now you see it now you don't" requirement. The provision instructs law enforcement officers, prosecutors, trial judges, and

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[33] Many other decisions of this Court reinforce this line between violent rhetoric and violent action. *See, e.g, Ashcroft v. Free Speech Coalition*, 122 S.Ct.1389, 1403 (2002) ("To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 894 (1982)(Despite the fact that "[i]ntimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results," this Court held that the speech of the defendant Charles Evers was constitutionally protected, including a statement that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," noting that "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*" and that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open.") (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1969)); *Hess v. Indiana*, 414 U.S. 105 (1973) (overturning conviction of anti-war protestor for vulgar statement that the protesters would re-take a street "later" because the threatened lawless action was not immediate).

juries that nothing beyond the mere burning of the cross in *required* to sustain an arrest, prosecution, or conviction.[34]

Virginia argues that its law poses no danger to free speech because it must always prove intent to intimidate. But under the prima facie evidence provision, this is mere illusion. *Brandenburg* held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[35] The *Brandenburg* standard need not be satisfied under the Virginia statute,

[34] The danger is not speculative. As the record in the Black case demonstrates, the arresting officers in the case understood the law as making it a crime to burn a cross in Virginia, period. J.A. 74 (Sheriff Warren Manning stating to Black: "there's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this . . .").

[35] The Supreme Court of Virginia ruled, appropriately, that in light of its holding that the cross-burning law was void on its face because it suffered from impermissible content and viewpoint discrimination, it need not reach and resolve the *Brandenburg* arguments advanced by the Respondents, including Respondent Black's "as applied" challenge. The *Brandenburg* case, however, remains in play as an important First Amendment precedent germane to the question that *is* before this Court, just as *Brandenburg* was germane in *R.A.V. See R.A.V.*, 505 U.S. at 402, n.4 (White, J., concurring) ("This does not suggest, of course, that cross burning is always unprotected. Burning a cross at a political rally would almost certainly be protected expression. *Cf. Brandenburg v. Ohio*, . . . But in such a context, the cross burning could not be characterized as a 'direct personal insult or an invitation to exchange fisticuffs,' *Texas v. Johnson*.") (internal citations omitted). The Question Presented in this Court's grant of *certiorari* therefore does fairly include the issue of whether the prima facie evidence standard violates the First Amendment by in effect relieving Virginia of the actual burden of satisfying the evidentiary standards required by the First Amendment under decisions such as *Brandenburg* or *Watts*.

however, and in Black's case below, the trial court refused to allow Black a *Brandenburg* jury instruction. J.A. 142-46. The *Watts* "true threat" test requires a case-by-case inquiry into whether a threat is real or mere rhetoric, but the prima facie evidence provision eliminates the bother.[36] Cases such as *Cohen* teach that modern "fighting words" prosecutions require a face-to-face immediacy akin to (if not, indeed, identical to) the *Brandenburg* standard, but no such showing is necessary under the Virginia law.[37]

Certainly the protections of cases such as *Brandenburg*, *Watts*, or *Cohen* are not so chimerical that they can be defeated by such wispy sleight-of-hand. What these decisions require is a rigorous case-by-case inquiry into the nexus between speech and crime, performed in the first instance by the jury and trial court, and then subject to the rigors of independent appellate review. Virginia cannot

[36] In *Watts v. United States*, 394 U.S. 705 (1969), Watts was convicted of willfully making a threat to take the life of the President during a public rally at the Washington Monument for statements such as "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court summarily reversed Watts' conviction, holding that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President" and protected by the First Amendment. *Id.* at 708.

[37] When this Court first used the phrase "fighting words" in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), it seemed to encompass two distinct types of language, words "which by their very utterance inflict injury" and words that "tend to incite an immediate breach of the peace." *Id.* at 571-72. Modern First Amendment cases reject the first form of fighting words, to the extent that the state may condemn the *mere utterance* of some phrase or the mere brandishing of some symbol on the theory that standing alone, without proof of more, it "inflicts injury." Cases such as *Cohen v. California* 403 U.S. 15 (1971), instead limit the "fighting words" doctrine to "a direct personal insult" directed at the hearer. *Id.* at 20. This effectively makes the fighting words doctrine nothing more than a specific application of the immediacy requirement central to *Brandenburg*. *See also Gooding v. Wilson*, 405 U.S. 518 (1972) (overturning conviction for vulgar insult to police officer); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (same).

simply label a symbol a presumptive threat and be done with it. A change in terminology is not a change in principle. Virginia insists that cross-burning is a shorthand for intimidation. Yet Cross-burning is not intimidation, any more than flag-burning is sedition, or an erotic movie is sex. Cross-burning is symbolic expression. At a given time and place a burning cross may be an instrument of intimidation, as an almost infinite variety of expression and conduct may, in context, be such an instrument. But Virginia cannot simply declare, through fiat, a presumptive equation between intimidation and one expressive ritual. Virginia's claimed shorthand is an unconstitutional shortcut.

This is not a quibble. The prima facie evidence provision affronts the First Amendment in a deeply offensive way, by in effect permitting the government to "brand" certain speech, in a kind of First Amendment variant of a Bill of Attainder, declaring it by name to be a message that presumptively violates the law. This type of advance "branding" was once permitted under our Constitution. It was exactly this method of regulation that drew one of Justice Holmes' great free speech dissents, in *Gitlow v. New York*, 268 U.S. 652 (1925), in which he argued vociferously against the proposition that the New York legislature could declare in advance that certain utterances constituted, intrinsically, a clear and present danger. In a haunting admonition, Justice Holmes warned: "Every idea is an incitement." *Id.* at 673 (Holmes, J., dissenting).

This branding device, however, is permitted no longer. The views of Justice Holmes have prevailed over time. This Court has now rejected the notion that a legislature may determine, in advance and in the abstract, that a certain word, symbol, or phrase is effectively taboo in

public discourse, attaching legal penalties to its mere utterance or display.[38]

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[38] *See Landmark Communications v. Virginia, Inc.*, 435 U.S. 829, 843 (1978) ("This legislative declaration coupled with the stipulated fact that Landmark published the disputed article was regarded by the court as sufficient to justify imposition of criminal sanctions. Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *Cohen v. California*, 403 U.S. at 26 ("Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered."); *Whitney v. California*, 274 U.S. 357, 279-80 (1927) (Brandeis, J., concurring) ("The legislative declaration .... does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution.").

CONCLUSION

For the reasons set forth, the judgment of the Supreme Court of Virginia should be affirmed.

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(16)

Supreme Court, U.S.
FILED
OCT 9 2002
CLERK

No. 01-1107

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

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26 pp

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INTRODUCTION

Respondents' brief is striking in that it seeks nothing less than a fundamental alteration of this Court's well-settled First Amendment jurisprudence. First, because symbols can be used to convey a wide variety of messages, respondents assert that the Commonwealth cannot criminalize the use of a burning cross as a tool of intimidation. Second, respondents take the position that a content-based regulation of proscribable expression can never be constitutional. Their position is directly contrary to this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which clearly recognized that, in certain limited instances, government may engage in content discrimination in its regulation of proscribable expression. Third, while criminal statutes regularly assign an inference to some specific evidence, respondents insist that this is unconstitutional when the evidence might also be regarded as symbolic expression. None of these propositions finds any support in this Court's jurisprudence and all must be rejected.

ARGUMENT

I. THE VIRGINIA STATUTE IS CONTENT-NEUTRAL.

A. The Virginia Statute Applies Regardless of Secondary Messages That Might Accompany the Message of Intimidation.

Respondents appear to acknowledge that the Virginia statute does *not* "single out an identifiable perspective on the ideological or political spectrum." Resp. Br. at 7. They recognize that the Virginia statute – unlike the St. Paul ordinance at issue in *R.A.V.* – is not limited to speech aimed at "race, color, creed, religion or gender" or at any other category. *Id.* (quoting *R.A.V.*, 505 U.S. at 380). Although such impartiality demonstrates that the Virginia statute is content-neutral, respondents insist that the statute is content-based because it focuses on a particular

symbol. They seem to regard the symbol of a burning cross as an empty vessel into which different speakers might pour whatever content they desire, and they view the Virginia statute as discriminating against these yet-to-be-chosen messages. The argument is flawed for several reasons.

First, respondents fail to recognize that, just as words acquire their meaning by usage, so do symbols.[1] In the lexicon of American society, a burning cross – standing alone and without explanation – is understood by perpetrator and victim alike as a symbolic threat of violence.[2] *See State v. T.B.D.*, 656 So. 2d 479, 481 (Fla. 1995); United States Br. at 3-5. This is the message the Virginia statute prohibits, and this Court has made it clear that such a prohibition is constitutional. *R.A.V.*, 505 U.S. at 388.

Second, as respondents recognize, different speakers might sometimes intertwine their messages of intimidation with different secondary messages, and those secondary messages could be constitutionally protected. Resp. Br. at 17-18. One such secondary message might be advocacy of the bigoted views espoused by the Ku Klux Klan. *See* Com. Br. at 6-7 (describing rhetoric at Klan rally led by Black). Another might be resentment that a neighbor has challenged the discharge of firearms in a residential area. *See* Com. Br. at 3-4 (describing actions by Elliot and O'Mara). Even so, the Virginia statute does not favor or disfavor any such secondary messages. It is

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[1] Respondents' position is reminiscent of Humpty Dumpty in Lewis Carroll's *Alice in Wonderland*. "'When I use a word,' Humpty Dumpty said in rather scornful tone, 'it means just what I choose it to mean – neither more nor less.'" L. Carroll, *Alice's Adventures in Wonderland* (1865).

[2] If government were to ban some symbol having no recognized meaning – a truly empty vessel – such a quirky regulation of speech would likely violate the First Amendment, but not because of any discrimination based on content or viewpoint.

entirely neutral as to any and all such messages. Thus, the Virginia statute is fundamentally different from the ordinance at issue in *R.A.V.*

The St. Paul ordinance did not treat all secondary messages alike. Secondary messages addressing certain topics – "race, color, creed, religion or gender" – were banned when linked to fighting words. *R.A.V.*, 505 U.S. at 391. However, secondary messages addressing other topics – "political affiliation, union membership, or homosexuality" – were not affected. *Id.* The fact that the ordinance proscribed only certain secondary messages while permitting others was quintessential content discrimination that rendered the statute constitutionally defective. The Virginia statute applies to *all* acts of burning a cross with intent to intimidate regardless of *any* secondary message that might be conveyed. Thus, the Virginia statute is content-neutral.

B. Cross Burning and Flag Burning Are Readily Distinguishable.

Respondents repeatedly assert that cross burning is analogous to flag burning, an act that is constitutionally protected. *See* Resp. Br. at 9-11, 35, 38. Superficially, the analogy might seem appealing; but, in this regard, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). Given our history, flag burning and cross burning are fundamentally different. Those who burn a flag – any flag – typically do so in order to express ardent – and disrespectful – opposition to the government or to some idea that the unburned flag is viewed as representing. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). By contrast, cross burning is typically not intended to express opposition to Christianity or to any other idea that an unburned cross might conceivably represent. Crosses are burned to instill fear. Thus, when a legislature prohibits burning the American flag, it is targeting a protected message: dissent from the values or

policies the flag represents. In contrast, when a legislature bans cross burning with the intent to intimidate, the only message it targets is intimidation – and intimidation is not protected.

C. Virginia May Focus on Those Symbols of Intimidation That Are the Most Problematic.

Respondents contend that, because cross burning may be used to convey messages other than intimidation, Virginia may not ban it – even where the ban is limited to intimidation. In respondents' view, the Commonwealth must either ban all symbols as tools of intimidation or ban none; it may not focus on those symbols of intimidation that are the most problematic. Their position has no foundation in this Court's jurisprudence and would lead to extreme results.

1. As the United States points out in its brief in support of Virginia, the Constitution permits a State to narrow its focus. United States Br. at 24-25. Upholding a state regulation of optometrist's trade names to prevent misleading or deceptive advertising, this Court noted that "[t]here is no requirement that the State legislate more broadly than required by the problem it seeks to remedy." *Friedman v. Rogers*, 440 U.S. 1, 15 n.14 (1979). Virginia has reasonably identified intimidation by cross burning as a particularly serious evil and has thus enacted a statute focused on that particular activity. *See United States v. O'Brien*, 391 U.S. 367, 375 (1968) (upholding a statute punishing the destruction of draft cards but not other government documents). Virginia is not required to ban the burning of circles or squares or other geometric designs or to treat all tactics of intimidation alike. *See Burson v. Freeman*, 504 U.S. 191, 207 (1992) ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist."). Virginia is free to criminalize only a particular act of intimidation that

presents a special risk of harm to the Commonwealth and its citizens.

2. The position advocated by respondents would lead to extreme results. Virtually any symbol used to intimidate has the potential to convey a message that is protected. For example, brandishing or discharging a firearm in the presence of another is often intended – and understood – as an act of intimidation. Yet, the display of such a weapon might also be used symbolically to convey a constitutionally protected message, such as expressing support for the right to keep and bear arms, or emphasizing the intensity of the speaker's views about war and peace or some other issue of public policy. The discharge of such a weapon might also be used to celebrate some victory or to honor a fallen hero, as is done at military funerals. Yet, surely the capacity of weapons to convey protected messages does not preclude government from enacting laws that prohibit brandishing or discharging firearms with the intent to intimidate. So it is with cross burning. The fact that a burning cross might conceivably be used to convey some constitutionally protected message does not preclude Virginia from making the act unlawful when it is intended to intimidate.

D. The Content-Neutrality of the Statute Is Not Affected by the Existence of "Other Options."

Respondents attempt to persuade this Court that the statute is not content-neutral by suggesting other ways in which the same intimidating activity might be prohibited. They say there are "no valid governmental interests underlying cross-burning statutes that cannot be vindicated" through some other statute. Resp. Br. at 23.[3] But,

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[3] As an example of a statute they find acceptable, respondents cite a newly-enacted Virginia law, Va. Code § 18.2-423.01, that prohibits

(Continued on following page)

their protestation is irrelevant. The availability of other options is not the test of whether the option chosen is content-neutral or constitutional. The Constitution does not require the Commonwealth to "strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935). Cross burning is an especially virulent form of intimidation from the standpoint of both the victim and the community at large. *See* Com. Br. at 32-40. For the legislature to strike first and foremost at such an evil makes perfect sense. Conversely, to declare that Virginia may not differentiate between cross burning and less virulent, more obscure acts of intimidation would disregard a sense of proportion, undermine law enforcement priorities and risk dissipating public contempt for this intimidating conduct.

Moreover, respondents' logic would necessarily overturn the federal statute making it illegal to threaten the President, 18 U.S.C. § 871. According to their argument, that statute would be unconstitutional because there are other ways to vindicate the valid governmental interests it serves, without singling out the President. For example, a statute might prohibit threats against any elected official or against any federal employee. Yet, this Court has twice made it plain that the presidential threat statute is constitutional. *R.A.V.*, 505 U.S. at 388; *Watts v. United States*, 394 U.S. 705, 707 (1969). Thus, respondents'

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burning *any* object with the intent to intimidate. The Commonwealth agrees that the new statute is content-neutral, but it is unclear why respondents think so. A burning cross combines two symbolic components: the cross and the fire. The new statute removes specific mention of one symbol: the cross. Yet, it leaves in place the other symbol: fire. If this Court finds that focusing on cross burning makes the challenged statute unconstitutional, it is only a matter of time before someone challenges the new statute because of its focus on fire. Indeed, the veiled hint of a possible challenge is found in one of the *amicus* briefs, which describes the new statute as "less objectionable" but stops short of conceding that it is constitutional. *See* Rutherford Institute Br. at 9.

argument about "other options" is plainly at odds with established First Amendment jurisprudence.

E. The Virginia Statute Is Consistent with the *O'Brien* Standard.

As an alternative means of assessing content-neutrality, this Court should follow the suggestion of the United States and apply the standard articulated in *O'Brien*. *See* United States Br. at 22-23. Indeed, this Court has consistently applied the *O'Brien* standard where, as in this case, the challenged statute seeks to regulate activities that involve both expression and conduct. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (upholding ban on camping in Lafayette Park and National Mall).

Under the *O'Brien* standard, the Virginia statute must be upheld if it promotes an "important or substantial governmental interest" that is "unrelated to the suppression of free expression" and if the statute restricts expression only to the extent "essential to the furtherance" of the substantial governmental interest. *O'Brien*, 391 U.S. at 377. The Virginia statute clearly meets this standard. Its purpose is to prevent an especially virulent form of intimidation. Whether the intimidating symbol is planted in a private lawn, or nearby street or some other public place, this purpose is both substantial and completely unrelated to the suppression of protected expression.[4] Further, because cross burning is prohibited only if it is intended to

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[4] Respondents note "that fear breeds repression; that repression breeds hate; [and] that hate menaces stable government. . . . " Resp. Br. at 38 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). It was precisely to prevent the fear inspired by cross burning – and to stop this downward spiral at the outset – that Virginia enacted the statute at issue. *See* Com. Br. at 221-24, 38-40.

intimidate, the statute restricts expression only to the extent essential to the furtherance of that interest.[5] Thus, the law is constitutional.

II. EVEN IF VIRGINIA'S STATUTE IS CONTENT-BASED, IT IS CONSTITUTIONAL UNDER THE THREE EXCEPTIONS DESCRIBED IN *R.A.V.*

Respondents' discussion of the three *R.A.V.* exceptions is founded on their hope that this Court did not mean what it said when it decided that landmark case. They insist that an absence of content-neutrality is fatal *per se*, even where – as here – only intimidation is proscribed.[6] *R.A.V.* says otherwise. The three exceptions it articulates come into play only *after* it is determined that a challenged statute lacks content-neutrality. 505 U.S. at 388-390. Even if the Virginia statute were deemed to be content-based, it would still be constitutional under each of these exceptions.

A. Cross Burning Is an Especially Virulent Form of Intimidation.

The Commonwealth has shown that cross burning is an especially virulent form of intimidation because it

[5] While application of the *O'Brien* standard is appropriate in all venues named in the statute, it is especially appropriate where – as in the case of Elliott and O'Mara – the cross burning occurs in conjunction with a trespass onto the property of another. "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Neither are trespass or vandalism, which are physical assaults on the property of another.

[6] *See* Resp. Br. at 37 ("The pivotal question here . . . is whether the statute's focus on cross-burning is sufficient to render it content-based or viewpoint-based.").

demonstrates with "special force" why "threats of violence are outside the First Amendment." Com. Br. at 32 (quoting *R.A.V.*, 505 U.S. at 388). Respondents' brief does not challenge this assessment. Indeed, respondents appear to agree that intimidation by cross burning is especially virulent, saying: "It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames." Resp. Br. at 6. The chief passion thus inflamed is the victim's fear.[7] Yet, respondents contend that this is not what the Court had in mind when it described the first exception in *R.A.V.* Their argument cannot be squared with the language of *R.A.V.* or with its logic.

Respondents ask the Court to compare the cross-burning statute with 18 U.S.C. § 871, the federal law prohibiting threats against the President. Resp. Br. at 36. The Commonwealth welcomes the comparison. Approved in *Watts* and *R.A.V.*, this content-based restriction on expression provides a benchmark that confirms the constitutionality of the Virginia statute. Five points are significant:

1. Respondents say that § 871 is "grounded in the policy judgment that [a threat against the President] is especially dangerous and damaging to the polity." Resp. Br. at 36. The Virginia statute is grounded in the same sort of policy judgment about the ill effects of intimidation by cross burning. *See* Com. Br. at 21-24.

2. Respondents note that § 871 is "geared to the *identity* of the intended victim." Resp. Br. at 36 (emphasis in original). The Virginia statute protects everyone, the

[7] The three *amici* briefs filed by federal and state authorities concur in Virginia's assessment. United States Br. at 4 ("The association between acts of intimidating cross burning and acts of violence is well documented in recent American history."); Brief of New Jersey and thirteen other States at 1 ("Cross-burning is known by the actors, the victims, and the State governments to cause unique and significant harm."); California Br. at 3 (describing cross burnings as "especially insidious").

weak as well as the powerful. Such universal protection is a point in *favor* of the Virginia law.

3. *R.A.V.* noted that § 871 prohibits *all* threats against the life of the President and does not single out threats based on opposition to particular presidential policies. 505 U.S. at 388. Likewise, the Virginia statute prohibits *all* acts of intimidation by cross burning and does not single out threats based on disagreement over race, religion or any other topic.

4. Respondents say the federal law "does not target expression *as such*, but merely targets the conduct of threatening a specific *target*, the President." Resp. Br. at 36 (emphasis added). Under the Virginia statute, cross burning is not banned unless there is an intent to intimidate. Thus, like the federal law, the Virginia statute does *not* target expression as such, it merely targets the conduct of threatening by a means of a specific *tactic*, cross burning.

5. Respondents fault the Virginia law because it is limited to intimidation by means of a particular symbol. They ignore the fact that the President is *also* a symbol. He is a symbol of the policies he advocates, the government he heads and the nation he leads.[8] Threats against him may reflect – explicitly or implicitly – protected messages of political dissent. Yet, threats against the President are treated more harshly than threats against *other* public leaders even where such threats might reflect *support* for presidential views. Under *Watts* and *R.A.V.*,

[8] The President's status as a symbol is underscored by the fact that ill wishes against his person are recognized by this Court as a protected – albeit crude – form of political expression. *Watts v. United States*, 394 U.S. 705 (1969) (war protestor's statement that, if drafted, he wanted to put Lyndon Johnson in his rifle sights held to be protected political hyperbole); *Rankin v. McPhearson*, 483 U.S. 378 (1987) (deputy sheriff's expression of regret over failure of assassination attempt against Ronald Reagan held to be protected speech).

this sort of "content discrimination" is not problematic. Even though it is possible to design a broader anti-intimidation law that omits any reference to the President, it is not *necessary* to do so. The same is true with cross burning. In both cases, the symbol-focused statute is constitutional because the prohibited symbol-focused threat is one that demonstrates with "special force" why "threats of violence are outside the First Amendment." Both statutes are constitutional.

B. Cross Burning Has an Array of Secondary Effects.

Respondents do not challenge the Commonwealth's judgment that an epidemic of intimidation by cross burnings would spawn other grievous social ills, leading to a breakdown of law and order. *See* Com. Br. at 39. Instead, they maintain that the effects the Commonwealth foresees are not "secondary" within the meaning of the secondary effects doctrine. They are mistaken.

1. The Commonwealth has explained that, unlike the concerns voiced by St. Paul in *R.A.V.*, the social ills identified here are not simply the "emotive impact of speech on its audience." 505 U.S. at 394. Instead, they deal with the effect on law and order in the surrounding community. Thus, they are analogous to the effects identified as secondary in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *See* Com. Br. at 39. Respondents do not address the comparison and suggest no meaningful distinction.

2. Respondents fail to read carefully *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), which struck down a federal statute that regulated cable broadcasts that were indecent, but fully protected as to adults. In so ruling, the Court rejected a secondary effects argument, noting that the doctrine "has no application to content-based regulations targeting the *primary* effects of *protected* speech. . . . " *Id.* at 815 (emphasis added). The social ills the Commonwealth has identified are not the

primary effects of protected speech. They are the indirect effects of intimidation – secondary effects of unprotected speech. Even if cross burning is assumed to convey dual messages – intimidation wrapped with bigotry – the ills the Commonwealth seeks to prevent are not caused by the message of bigotry, which is protected, but by the intimidation, which is not.[9]

Ultimately, it makes little difference whether the social ills arising from intimidation by cross burning are considered "secondary" or "primary." The key point is that the effects identified by the Commonwealth are *real* – a point respondents do not deny. If these effects are regarded as "secondary" then the secondary effects doctrine – and the second *R.A.V.* exception – are applicable. On the other hand, if those effects are regarded as "primary" then they confirm that cross burning is an especially virulent form of intimidation and underscore why the first *R.A.V.* exception is applicable. In either case, the statute is constitutional.

C. No Official Suppression of Ideas Is Afoot.

As previously discussed, the Virginia statute qualifies for the third *R.A.V.* exception because "there is no realistic possibility that official suppression of ideas is afoot." Com. Br. at 40 (quoting *R.A.V.*, 505 U.S. at 390). Respondents dispute this conclusion by glossing over important distinctions and by singing lofty panegyrics that do not provoke disagreement so much as they leave one searching for analysis about the case at bar.

The parties agree that legislative purpose is irrelevant in determining whether a statute is content-neutral. Com. Br. at 17-21; Resp. Br. at 19-22. But, if a statute is deemed

[9] Respondents also cite *Boos v. Barry*, 485 U.S. 312 (1988), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Both cases involved only protected speech. Neither case involved intimidation.

content-based, legislative purpose becomes useful in determining whether official suppression of ideas is afoot. As an historical matter, the purpose of the Virginia statute was to prohibit intimidation, not to suppress ideas of racial bigotry. *See* Com. Br. at 21-24. This fact – unchallenged by respondents – is one of *several* reasons why the statute qualifies for the third *R.A.V.* exception. *See* Com. Br. at 40-41.

Also telling is respondents' failure to explain just what idea they contend is being suppressed. They seek to excuse this omission by saying the disfavored concept is "less determinate" and has a "wider range of meanings" than language might convey. Resp. Br. 38. Such an amorphous position cannot possibly form the basis for a constitutional rule. Their only coherent claim is that intimidation by cross burning is analogous to "intimidation through flag-burning." Resp. Br. 38. Yet, this claim is simply wrong. It ignores the critical distinction between these two symbolic uses of fire. *See supra* at 3-4.

III. THE STATUTORY INFERENCE IS CONSTITUTIONAL.

Respondents argue that the statutory inference in the Virginia statute makes the law overbroad. They are mistaken. Under this Court's jurisprudence, before a statute may be invalidated for overbreadth, the alleged overbreadth must "not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973) (emphasis added). As previously shown, the Virginia Supreme Court erred in the first part of the analysis, and it essentially disregarded the second. Com. Br. at 46-48. Respondents fail to repair these flaws. They can prevail only by an unwarranted expansion of the overbreadth doctrine.

A. There Is No Real Overbreadth.

To identify real overbreadth, this Court has consistently focused on the challenged statute's *prohibitory* terms, asking whether those terms are so broad – or so vague – as to forbid expression that is constitutionally protected. *See* Com. Br. at 46. No one has suggested that the Virginia statute is vague, and its prohibitory terms are not violated unless there is intimidation – a type of expression that is unprotected. Thus, there is no real overbreadth here.

Respondents offer three arguments. First, they ask the Court to carry the search for overbreadth *outside* of the prohibitory terms of the statute, an approach they suggest is supported by two cases: *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), and *Stromberg v. Carlson*, 283 U.S. 359 (1931).[10] Second, respondents appear to suggest that some acts of intimidation may be protected under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Third, they compare the Virginia statute to discredited laws imposing a *per se* ban on certain statements. None of these arguments have merit.[11]

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[10] Respondents also say that, if the statutory inference is found invalid, they may not be retried. Resp. Br. at 35 n.32. They are mistaken. A decision invalidating the statutory inference would not change any element of the offense and, if a jury has been improperly instructed, the proper remedy is a new trial under correct instructions. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979) (remanding case to Montana Supreme Court after reversing conviction based on invalidity of statutory inference); *Sandstrom v. Montana*, 603 P.2d 244, 245 (Mont. 1979) (remanding case for new trial). Respondents are also mistaken in their view that the severability argument has been waived. Resp. Br. at 39 n.32. The Commonwealth argued below that the Virginia statute is not invalid on its face and, under this Court's jurisprudence, a statute may not be deemed facially invalid if a limiting construction – including severance – would save it.

[11] In a footnote, respondents also claim that the statutory inference led the sheriff who arrested Black to disregard the intent element and

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1. As explained in depth by one of the *amici*, the overbreadth doctrine "should, at the very least, be kept on a tight leash." Criminal Justice Legal Foundation Br. at 5. To search for overbreadth by looking outside a statute's prohibitory terms would cut the leash altogether. *See* Com. Br. at 44. Neither *Ashcroft* nor *Stromburg* supports respondents' desire for such an approach.

a. In *Ashcroft*, this Court struck down a newly-enacted federal ban on "virtual" child pornography. In doing so, the Court focused on the statute's prohibitory terms and found they banned speech that was constitutionally protected. This proposition – essential to the result in *Ashcroft* – has no counterpart in the case at bar. The Virginia statute *only* bans cross burning where there is an intent to intimidate, and intimidation may be proscribed. In short the Virginia statute stands in stark contrast to the federal statute at issue in *Ashcroft* because, unlike the federal statute, the Virginia statute does not ban *any* constitutionally protected speech.

Ignoring the fundamental failure of their analogy, respondents nevertheless try to equate the statutory inference in Virginia's statute with the affirmative defense available under the federal law. The effort fails. The affirmative defense found deficient in *Ashcroft* was only available to those charged with *producing* the pornography. It was not available to those charged with *possessing* it, nor was it available to those who produced the pornography using *computers* rather than adult actors. *Ashcroft*, 122 S. Ct. at 1405. In other words, even with the

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to act as if cross burning alone is a crime in Virginia. Resp. Br. at 44 n.34. The record does not support this conclusion. By telling Black "there's a law . . . that you cannot burn a cross," J.A. 74, the sheriff was not attempting to recite the elements of the offense (he did not mention the "public place" element either) but was merely informing Black in general terms about the reason for his arrest.

affirmative defense, the statute still prohibited a substantial amount of protected speech and so remained overbroad. Describing it as "incomplete and insufficient," the Court held that the affirmative defense could not save the statute. *Id.*[12]

The Virginia statute is not analogous. Unlike the federal statute in *Ashcroft*, its prohibitions are not overbroad. The evidentiary inference does not render them so, any more than the affirmative defense in *Ashcroft* could make overbroad prohibitions constitutional. Under the Virginia statute, if the intent to intimidate is not established – and the burden rests on the prosecution – a defendant must be acquitted. *See* J.A. 195, 250 (jury instructions). Because the Virginia statute does not prohibit *any* protected speech, *Ashcroft* offers respondents no support.

b. Respondents' invocation of *Stromberg* is likewise ill-conceived. The California statute at issue in that case prohibited expressive conduct – display of a red flag – when undertaken for any one of three purposes. A jury found Stromberg guilty of violating the law, but did not specify which of the three unlawful purposes was the basis for its decision. This Court held that two of the three purposes involved activities that could be legitimately prohibited, but that the third purpose involved protected expression. Unable to determine whether the guilty verdict rested on speech that was protected or proscribable, the Court overturned the conviction. Such ambiguous jury verdicts are not possible under the Virginia statute

[12] Contrary to respondents' suggestion, the Court expressly declined to decide whether the burden of an affirmative defense could ever be constitutionally imposed on a speaker. *Id.* at 1405. It certainly did not reach such a conclusion about a mere statutory inference.

because a conviction for cross burning cannot be supported by alternative purposes. There must be an intent to intimidate, and intimidation is not protected. *Stromberg* is simply irrelevant.

2. Respondents then turn to *Brandenburg*, where this Court recognized that the Constitution limits the extent to which government may forbid speech that advocates using force or violating the law. Their argument appears to be that the Virginia statute is overbroad because it bans *all* cross burning with intent to intimidate, whether or not a particular incident is likely to produce imminent lawless action. If this is their argument, they are wrong. While the advocacy of force and violence may be protected in some limited circumstances, intimidation never is. *See Black v. Commonwealth*, 553 S.E.2d 738, 755 (Va. 2001) (Hassell, J., dissenting), J.A. 308.[13]

Brandenburg protects the advocacy of force and violence where the evils to be avoided – force and violence – depend on additional action by the speaker and/or his sympathizers. Thus, those evils are at least one step removed from the speech in question. Given this margin of safety, rhetorical excess is tolerated. But, where individuals seek to intimidate, the evils to be avoided – *fear* of

[13] In stark contrast to the Supreme Court's decision in *Brandenburg*, we are not concerned here with abstract teaching regarding the moral propriety or even moral necessity of violence as a means for accomplishing political reform. Rather, the subject of this case is . . . a statute which proscribes the burning of a cross with the intent to intimidate, which we have held means to place the victim in fear of bodily harm.

Black, 553 at 755 (Hassell, J., dissenting), J.A. 308. Because it ruled against the Virginia statute on other grounds, the majority decision did not reach the *Brandenburg* issue.

bodily injury and the consequences of such fear – depend on nothing more than the communication reaching its intended audience. No additional action by the speakers is required. Thus, *Brandenburg* does not apply.[14]

Even so, respondents seem to be arguing that intimidation is constitutionally protected unless the person making the threat is on the verge of carrying it out or the threat is likely to instill fear in its victim. Such an approach would be a radical departure from this Court's jurisprudence. For example, under their approach, a threat against the life of the President would be protected speech – no matter how seriously it was intended – unless the perpetrator actually had the means to act on his designs and/or induced actual fear on the part of the President. This is obviously not the approach followed in *Watts*, where this Court approved the statute banning threats against the President, qualifying it only to distinguish between "true threats" and "political hyperbole." 344 U.S. at 707.[15] Nowhere has this Court ever suggested that the Constitution protects those who communicate a threat with an intent to intimidate. It should not do so now.

3. In a final, broad-brush argument, respondents contend that it is simply impermissible for Virginia to permit a jury to infer that the act of cross burning conveys an intent to intimidate. Again they miss the mark.

a. Respondents accuse Virginia of acting by "fiat," and they compare the cross-burning statute to laws penalizing the "mere utterance or display" of "a certain word, symbol or phrase." Resp. Br. at 46-47. Yet, the Virginia statute does *not* penalize the "mere display" of a

[14] *See* Criminal Justice Legal Foundation Br. at 10-11.

[15] The Virginia statute needs no such judicial gloss. By its own terms, it is limited to cases where there is an intent to intimidate, and "intimidation" under Virginia law means acts that put the victim in fear of bodily harm. *See* Com. Br. at 13 n.6.

burning cross. It requires an intent to intimidate. Moreover, use of the word "fiat" implies that Virginia has acted arbitrarily, but that is simply not so. The connection between cross burning and the intent to intimidate is obvious to anyone familiar with our history. *See T.B.D.*, 656 So. 2d at 481; *compare* United States Br. at 3-5 (detailing historical correlation between cross burning and violence) *with* Resp. Br. at 24 (accepting historical correlation).

b. Respondents quote several cases for the undisputed proposition that, in the area of First Amendment law, legislative determinations are subject to judicial review. *See* Resp. Br. at 47 n.38. Yet, they fail to take the next step and acknowledge that judicial review of statutory inferences is governed by a well-established two-part standard. Specifically, a statutory inference is constitutional if (i) the state retains the burden of proof on the fact to be presumed, and (ii) "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Barnes v. United States*, 412 U.S. 837, 842 (1973) (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)) (internal quotation marks omitted). Respondents' failure to address this standard is particularly revealing because the Commonwealth expressly called it to their attention. Com. Br. at 42 n.24. The fact is that the statutory inference meets this test.[16] The prosecution retains the burden of proving intent, and the presumed fact – an intent to intimidate – is more likely than not to flow from

[16] If such an inference is not permitted in the statute, it is questionable whether it could be permitted in practice. In other words, it would be doubtful whether the prosecution's case could survive a motion to strike where the cross burning – though intended to intimidate – was perpetrated by individuals clever enough to do so without providing any indicia of their intent other than their already fearsome message.

the proved fact – burning a cross in one of the proscribed venues.

B. There Is No Substantial Overbreadth.

Even if respondents were able to demonstrate real overbreadth, they have not demonstrated – nor have they attempted to demonstrate – that such alleged overbreadth is "*substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick,* 413 U.S. at 615 (emphasis added). *See* Com. Br. at 46-48. For this reason, too, the overbreadth challenge must fail.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief of petitioner, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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October 9, 2002

Supreme Court, U.S.
FILED
AUG 9 2002
OFFICE OF THE CLERK

No. 01-1107

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT AND JONATHAN O'MARA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state statute that prohibits the burning of a cross with the intent to intimidate violates the First Amendment.

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In the Supreme Court of the United States

No. 01-1107

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT AND JONATHAN O'MARA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States, like the Commonwealth of Virginia, prosecutes persons who burn crosses, or conspire to do so, in order to intimidate others. See, *e.g.*, *United States* v. *Magleby*, 241 F.3d 1306 (10th Cir. 2001); *United States* v. *Stewart*, 65 F.3d 918 (11th Cir. 1995), cert. denied, 516 U.S. 1134 (1996); *United States* v. *Hayward*, 6 F.3d 1241 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994). The United States does so under statutes that, in contrast to the Virginia statute here, do not focus exclusively on intimidation by cross burning, but instead generally prohibit the use of force or threats of force to intimidate a person because of his race (or other protected status) and his exercise of federal housing rights, see 42 U.S.C. 3631, or generally prohibit conspiracy to intimidate a person in the exercise of federal

rights, see 18 U.S.C. 241. The federal statutes and the Virginia statute share the common purpose of preventing conduct that instills fear in its victims, disrupts the life of the community, and increases the potential for violence. Such statutes are constitutional under the First Amendment even though, in some instances, they reach conduct that may be intended not only to intimidate, but also to express an idea or viewpoint.

The United States has a significant interest not only in prosecuting acts of cross burning that come within the scope of its own statutes, but also in assuring that the States retain wide discretion to address the continuing national problem of cross burning as an instrument of intimidation. Some States, following the United States' approach, may choose to adopt statutes that encompass a wide array of coercive conduct intended to prevent or deter their citizens from engaging in protected activities. Other States, following Virginia's approach, may choose to adopt statutes focused on the particular conduct that has been employed to intimidate their citizens. Both approaches should be permissible under the First Amendment so long as the gravamen of the offense is intimidation, not expression.[1]

STATEMENT

For much of the past century, a burning cross has served as both "a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and * * * other groups." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). This case concerns whether

[1] The federal statutes that have been applied to prosecute cross burning do not contain any provisions comparable to Virginia's provision that the burning of a cross is "prima facie evidence of an intent to intimidate," Va. Code Ann. § 18.2-423 (Michie 1996), and the United States expresses no view on the constitutionality of that provision. See p. 24 note 10, *infra*.

a State is constrained, because of the symbolic component of cross burning, from specifically regulating the intimidation component.

1. Cross burning, which originated in the Scottish Highlands as a means of signaling from one clan to another, was unknown in the United States until the early 20th Century. The first reported cross burning in this country occurred in October 1915 at Stone Mountain, Georgia, when a group calling itself the Knights of Mary Phagan burned a giant cross that could be seen miles away in Atlanta. The Stone Mountain cross burning has been attributed to the same vigilantes who two months earlier abducted Leo Frank, a Jewish merchant whose sentence for Phagan's murder had been commuted, from a Georgia prison farm and hanged him. See Wyn C. Wade, *The Fiery Cross: The Ku Klux Klan in America* 144, 146 (1987); Michael Newton & Judy Newton, *The Ku Klux Klan: An Encyclopedia* 145-145, 325-326 (1991).

Cross burning soon became a part of the prescribed ritual at Ku Klux Klan gatherings. But cross burning also came to have a more sinister use as one of the means, along with arson, assault, bombing, and even murder, used by the Klan and others to "terrify people out of engaging in particular kinds of behavior." Nancy MacLean, *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* 150 (1994). Indeed, on occasions when cross burning alone "failed to intimidate," Klan members "resorted to beatings and murder," among other tactics. Juan Williams, *Eyes on the Prize: America's Civil Rights Years 1954-1965*, at 39 (1987); see Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. Crim. L. & Criminology 335, 342 (Fall 2001-Winter 2002) (noting that an "escalating campaign to eject a [minority] family" from a white neighborhood could begin with "cross burnings, window breaking, or threatening

telephone calls," and culminate with bombings). The association between acts of intimidating cross burning and acts of violence is well documented in recent American history.[2]

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[2] See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 747-748 n.1 (1966) (quoting indictment charging conspiracy under 18 U.S.C. 241 to interfere with federally secured rights by, *inter alia*, "burning crosses at night in public view," "shooting Negroes," "beating Negroes," "killing Negroes," "damaging and destroying property of Negroes," and "pursuing Negroes in automobiles and threatening them with guns"); *United States* v. *Pospisil*, 186 F.3d 1023, 1027 (8th Cir. 1999) (defendants burned a cross in victims' yard, slashed their tires, and fired guns), cert. denied, 529 U.S. 1089 (2000); *United States* v. *Stewart*, 65 F.3d 918, 922 (11th Cir. 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied, 516 U.S. 1134 (1996); *United States* v. *McDermott*, 29 F.3d 404, 405 (8th Cir. 1994) (defendants sought to discourage African-Americans from using public park by burning a cross in the park, as well as by "waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park"); *Cox* v. *State*, 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U.S. 987 (1992); Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* 847 (2002) (referring to a wave of "southern bombings, beatings, sniper fire, and cross-burnings" in late 1956 in response to efforts to desegregate schools, buses, and parks); Michael Newton & Judy Newton, *supra*, at 21 (observing that "Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence" by the Klan and its sympathizers); *id.* at 361-362 (describing cross burning and beatings directed at an African-American family that refused demands to sell its home); *id.* at 382 (describing incident of cross burning and brick throwing at home of Jewish officeholder); *id.* at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); Wyn C. Wade, *supra*, at 262-263 (describing incidents of cross burning, beatings, kidnapping, and other "terrorism" directed against union organizers in the South); *id.* at 376 (cross burnings associated with shooting into cars); *id.* at 377 (cross burnings associated with assaults on African-Americans); 1 Richard Kluger, *Simple Justice* 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued

2. In 1952, the Virginia General Assembly adopted the predecessor to the statute at issue here, "in direct response to Ku Klux Klan activities in Virginia, including incidents of cross burning." Pet. App. 6 (footnote omitted); see *id.* at 86-95 (newspaper articles describing such incidents). The statute, in its original form, made it unlawful "to place or cause to be placed on the property of another * * * a burning or a flaming cross * * * without first obtaining written permission of the owner or occupier of the premises." *Id.* at 6 n.3 (quoting 1952 Va. Acts ch. 483 § 2, at 477). In subsequent years, the General Assembly made the statute broader in some respects (*e.g.*, to include cross burning on "a highway or other public place"), and narrower in other respects (*e.g.*, to apply only to cross burning "with the intent of intimidating any person or group of persons"). In its present form, the statute provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Va. Code Ann. § 18.2-423 (Michie 1996).

3. This case arises out of the prosecutions of three individuals, respondents here, for violations of the Virginia statute. Two of those individuals, Richard Elliott and

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desegregation decisions); Leonard S. Rubinowitz & Imani Perry, *supra*, 92 J. Crim. L. & Criminology at 354-355, 388, 408-410, 419, 420, 421, 423 (describing incidents of cross burning accompanied by violence); Pet. App. 92-93 (describing 1951 Virginia cross burning accompanied by gunfire).

Jonathan O'Mara, were prosecuted for an attempted cross burning in Virginia Beach, Virginia, in May 1998. The third individual, Barry Elton Black, was prosecuted for a cross burning in Carroll County, Virginia, in August 1998.

a. Respondents Elliott and O'Mara, together with a third individual, attempted to burn a cross on the property of James Jubilee, an African-American who lived next door to Elliott and who had recently complained about the shooting of firearms in Elliott's backyard. Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. Pet. App. 2-3, 48-49.

At Elliott's trial, the court instructed the jury on the elements of attempted cross burning: "[t]hat the defendant intended to commit cross burning"; "[t]hat the defendant did a direct act toward the commission of the cross burning"; and "[t]hat the defendant had the intent of intimidating any person or group of persons." Pet. App. 75. The jury found Elliott guilty of attempted cross burning, but not of conspiracy. *Id.* at 3.

The court of appeals sustained the cross-burning statute against respondents' First Amendment challenge. The court concluded that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and as a threat of violence." Pet. App. 57; see *id.* at 3.

b. Respondent Black was charged with cross burning at a Ku Klux Klan rally. Pet. App. 4. At his trial, the court instructed the jury that the Commonwealth was required to prove beyond a reasonable doubt that Black "burned or caused to be burned a cross in a public place" and "did so with the intent to intimidate any person or group of persons." *Id.* at 66. The court further instructed the jury that an "intent to intimidate" means "a motivation to intentionally put a person or group of persons in fear of bodily harm." *Id.* at 66-67. The court added that "[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." *Id.* at 67. The jury found Black guilty. *Id.* at 4.

The court of appeals affirmed Black's conviction, rejecting his constitutional challenge to the statute "[f]or the reasons stated in *O'Mara*." Pet. App. 46; see *id.* at 4.

4. The Virginia Supreme Court, after consolidating respondents' appeals, reversed their convictions. The court held that the cross-burning statute, on its face, violates the First Amendment for two reasons.

First, the court held that the cross-burning statute "prohibits otherwise permitted speech solely on the basis of its content." Pet. App. 2. The court did not dispute that the Commonwealth could proscribe all "expressive conduct that is intimidating in nature." *Id.* at 11. The court reasoned, however, that the Commonwealth could not single out some such conduct "based upon hostility—or favoritism—towards the underlying message expressed." *Ibid.* (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 386 (1992)). The court concluded that the Commonwealth violated that principle by "selectively choos[ing] only cross burning because of its distinctive message." *Ibid.*

Second, the court held that the cross-burning statute is "overbroad," because of its provision that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate." Pet. App. 16-17. The court concluded that the provision could chill free expression, because "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution," even if "the trier of fact ultimately finds the actor not guilty of the offense." *Id.* at 17.

SUMMARY OF ARGUMENT

The United States and the Commonwealth of Virginia have taken divergent approaches in their regulation of cross burning intended to threaten or intimidate. The United States prosecutes certain acts of cross burning under federal civil-rights statutes that generally proscribe the use of force or the threat of force to intimidate an individual because of, *inter alia*, his race and his exercise of federal housing rights, see 42 U.S.C. 3631, or that generally proscribe conspiracy to interfere with the exercise of federally protected rights, see 18 U.S.C. 241. Virginia, in contrast, prosecutes similar acts under a statute that specifically proscribes cross burning "with the intent of intimidating any person or group of persons." The federal statutes are constitutional under the First Amendment for reasons articulated in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), and *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993). The Virginia statute's exclusive focus on cross burning with the intent to intimidate is constitutional as well.

The statutes under which the United States prosecutes cross burning—principally, 42 U.S.C. 3631 and 18 U.S.C. 241—are directed at conduct, without regard to its expressive content, if any. Those statutes are analytically indistinguishable from 18 U.S.C. 242, which prohibits "willfully subjecting any person * * * to the deprivation of any [federal] rights," and which *R.A.V.* and *Mitchell* identify as "a permissible content-neutral regulation of conduct." *Mitchell*, 508 U.S. at 487. As *R.A.V.* explains, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a [particular] idea or philosophy." 505 U.S. at 390. Thus, the United States may prosecute a cross burning intended to intimidate an individual because of his race and his exercise of his federal right to "occupy[] * * * any dwelling," 42

U.S.C. 3631(a), even if the cross burning is also intended to express an idea or philosophy.

The Virginia statute's focus on cross burning is constitutional for the same reason. The statute applies to *only* those cross burnings intended to intimidate, and to *all* such cross burnings regardless of any idea or viewpoint that they may be intended to express. As such, the statute is properly viewed as a regulation directed at conduct—the intentional use of a burning cross as a tool of intimidation—and not as a regulation directed at speech. To the extent that the First Amendment may require additional scrutiny because the statute focuses on an activity that may often be intended not only to intimidate but also to express an idea or viewpoint, the statute satisfies the applicable standard, which is that set forth in *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968). The statute serves the Commonwealth's important interest in protecting its citizens from coercive activity intended to put them in fear of harm. That interest is unrelated to the suppression of free expression. The statute is narrowly tailored to reach only cross burning intended to intimidate, leaving ample opportunity for the expression of any view, including by burning a cross on one's own property or otherwise in circumstances not intended to intimidate. A regulation of conduct, or a "nonspeech" element of expressive conduct, is not subject to the content-neutrality principle of *R.A.V.*; thus, a State is not required by the First Amendment to regulate all such conduct in the same manner or to the same extent, but instead may, for example, regulate intimidation by burning a cross without similarly regulating other modes of intimidation.

Alternatively, even if the Virginia statute is viewed (as the Virginia Supreme Court viewed it) as a selective regulation of intimidating expression, the statute does not violate the First Amendment. As the Court explained in *R.A.V.*, "[w]hen the basis for the content discrimination consists

entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists," because "[s]uch a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." 505 U.S. at 388. The government could constitutionally proscribe all sufficiently threatening or intimidating expression in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Ibid.* Those reasons apply with "special force," *ibid.*, to intimidating cross burning. Cross burning, because of its historical association with vigilantism and violence, has a unique potential for instilling fear in its victims, disrupting the life of the community, and precipitating other unlawful conduct. A regulation that focuses exclusively on intimidation by cross burning is justified for those content-neutral reasons.

ARGUMENT

A person has no First Amendment right to burn a cross in order to intimidate others, whether or not he also intends to express an idea or philosophy. Such conduct "produce[s] special harms distinct from [its] communicative impact," and thus is "entitled to no constitutional protection." *Mitchell*, 508 U.S. at 484. In *R.A.V.*, which arose out of the burning of a cross in the yard of an African-American family, the Court acknowledged that the government "has sufficient means at its disposal to prevent such behavior," 505 U.S. at 396, apart from an ordinance that prohibits "fighting words that contain * * * messages of 'bias-motivated' hatred," *id.* at 392. See *id.* at 380 n.1 (suggesting that such conduct may be prosecuted under, *inter alia*, a statute prohibiting threats). Indeed, the United States subsequently prosecuted the same cross burning at issue in *R.A.V.* under its statutes prohibiting, *inter alia*, the use of threats of force to intimidate a person because of his race and his exercise of federal housing rights, 42 U.S.C. 3631, and conspiracy to intimidate a person in the exercise of federal rights, 18 U.S.C. 241. See *United States* v. *J.H.H.*, 22 F.3d 821 (8th Cir. 1994) (rejecting First Amendment challenge to that prosecution).

Intimidation is not protected speech. It is conduct, physical or verbal, intended to coerce its victims by putting them in fear, typically of bodily harm. See, *e.g.*, *Black's Law Dictionary* 827 (7th ed. 1999) (defining "intimidation" as "[u]nlawful coercion, extortion"); *Anderson* v. *Boston Sch. Comm.*, 105 F.3d 762, 766 (1st Cir. 1997) (defining "intimidation" under Massachusetts Civil Rights Act as "putting in fear for the purpose of compelling or deterring conduct"); *United States* v. *Woodrup*, 86 F.3d 359, 363-364 (4th Cir.) (defining "intimidation" under federal bank robbery statute as conduct from which "an ordinary person * * * reasonably could infer a threat of bodily harm"), cert. denied, 519 U.S. 944 (1996); *United States* v. *McDermott*, 29 F.3d 404, 408 (8th Cir. 1994) (approving instruction defining "threaten" and "intimidate" under 18 U.S.C. 241 as "cover-[ing] a variety of conduct intended to harm, frighten, punish or prevent the free action of other persons"); *Sutton* v. *Commonwealth*, 324 S.E.2d 665, 670 (Va. 1985) ("[i]ntimidation * * * means putting a victim in fear of bodily harm"); 11th Cir. Pattern Jury Instructions—Criminal Cases, Instr. No. 87 (1997) (defining use of "threat of force" to "intimidate" under 42 U.S.C. 3631 as "to say or do something which, under the same circumstances, would cause another person of ordinary sensibilities to be fearful of bodily harm if he or she did not comply") (available on Westlaw). Intimidation is not necessarily, or even usually, associated

with the expression of ideas or viewpoints.[3] Thus, when a statute proscribes certain conduct (whether or not expressive) only when undertaken with the intent to intimidate, the statute is "insulate[d] * * * from unconstitutional application to protected speech." *United States* v. *Gilbert*, 813 F.2d 1523, 1529 (9th Cir.) (addressing intent to intimidate element of 42 U.S.C. 3631), cert. denied, 484 U.S. 860 (1987).[4]

Such a statute, if confined to a single type of conduct that often is intended not only to intimidate but also to express an idea or viewpoint, may nonetheless implicate the First Amendment by virtue of its impact on proscribable speech. The Virginia statute, unlike the federal statutes, may come within that category because of its focus on intimidation by cross burning. Such a statute still may satisfy the First

[3] Intimidation is an element of many federal offenses—ranging from bank robbery to witness tampering to obtaining nuclear material—that ordinarily are not associated with the expression of ideas or viewpoints. See, *e.g.*, 18 U.S.C. 831(a)(4) (obtaining nuclear material by intimidation); 18 U.S.C. 844(d) (transportation of explosives to be used to intimidate); 18 U.S.C. 1503 (intimidation of juror or judicial officer); 18 U.S.C. 1512(b) (intimidation with intent to influence official proceedings); 18 U.S.C. 1860 (intimidation in purchase or sale of public lands); 18 U.S.C. 2113(a) (intimidation to obtain money or property from financial institution); 18 U.S.C. 2231(a) (intimidation of person serving or executing search warrant).

[4] When the defendant's intent to intimidate is an element of a criminal offense, as it is under the federal and Virginia statutes used to prosecute intimidating cross burning, the evidence, taken as a whole, must be sufficient to establish that element beyond a reasonable doubt. The First Amendment provides additional protection by requiring "an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted); cf. *United States* v. *Hanna*, 293 F.3d 1080, 1087-1088 (9th Cir. 2002) (conducting independent review to determine whether record established a "true threat").

Amendment, either under the *O'Brien* framework for a regulation of expressive conduct or under one of *R.A.V.*'s exceptions for a selective regulation of proscribable expression that poses no threat of suppressing ideas or viewpoints.

I. THE UNITED STATES PERMISSIBLY REGULATES CROSS BURNING, WHEN INTENDED TO THREATEN OR INTIMIDATE, UNDER STATUTES THAT ARE DIRECTED AT CONDUCT WITHOUT REGARD TO ITS EXPRESSIVE CONTENT

The United States prosecutes cross burning under Acts of Congress that prohibit the use of force or threats of force to intimidate an individual because of his race (or other status) and his exercise of federal housing rights, see 42 U.S.C. 3631, and conspiracy to interfere with the exercise of federal rights, see 18 U.S.C. 241. See Appendix, *infra*, 1a, 6a-7a. Those statutes, on their face and as applied to cross burning, are constitutional under the First Amendment, because they are directed at conduct, without regard to its expressive content, if any.[5]

[5] An act of cross burning is not necessarily designed both to express a message, such as racial animus, and to intimidate. Some cross burnings, such as those that occur at a Ku Klux Klan rally from which the public is excluded, may be intended only to express a common ideology and to foster group solidarity. Other cross burnings, perhaps including the cross burning involving respondents Elliott and O'Mara, may be intended to intimidate for a purely personal reason, and not to express any idea or viewpoint. See Pet. 3 (noting the absence of any record evidence that respondents Elliott and O'Mara "are members of the Klan" or "hold any particular views on politics or race or any other subject"); Pet. App. 36 (Hassell, J., dissenting) (noting that Elliott and O'Mara "burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliotts' yard, not because of any racial animus"); see also, *e.g.*, *People* v. *Carr*, 97 Cal. Rptr. 2d 143, 146 (Ct. App. 2000) (Jewish teenager asked his friends to burn a cross in his family's yard because "he was mad at his parents; he didn't like his curfew

1. Most often, the United States prosecutes cross burning under 42 U.S.C. 3631, a provision of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* Section 3631 prohibits, among other things, using "force or threat of force" to "willfully injure[], intimidate[] or interfere[] with" any person because of his "race" and his "occupying * * * any dwelling." 42 U.S.C. 3631(a).

If more than one person is involved in planning or carrying out a cross burning, the United States may also charge those persons under 18 U.S.C. 241, which prohibits conspiracy to "injure, oppress, threaten, or intimidate any person" in the exercise of a federally secured right. Typically, in such a conspiracy prosecution, the underlying right is the right under 42 U.S.C. 1982 to purchase, lease, or hold real property free from racial discrimination.[6]

Those statutes may, consistent with the First Amendment, be applied to prosecute acts of cross burning intended to intimidate a victim, notwithstanding that those acts may

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and other rules"); *State* v. *Miller*, 629 P.2d 748 (Kan. Ct. App. 1981) (defendant burned a cross in the yard of a lawyer who had previously represented him and who was prosecuting him on traffic charges); *Williams* v. *Commonwealth*, 72 S.W.2d 31 (Ky. 1934) (defendant murdered his brother-in-law, while preparing to burn a cross on his property, apparently in response to an earlier disagreement). Some cross burnings may be intended for other purposes. See, *e.g.*, *People* v. *Steven S.*, 31 Cal. Rptr. 2d 644, 646 653 (Ct. App. 1994) (cross burning was purportedly "a practical joke"); Wyn C. Wade, *supra*, at 227 (describing an instance in which young Roman Catholics, whose religion was opposed by the local Klan, "lit crosses all over town and let the Klan take the blame").

[6] Defendants in a cross-burning case may also be prosecuted under 18 U.S.C. 245(b), which criminalizes interference "by force or threat of force" with other federally guaranteed rights, including voting, employment, and use of public facilities and public accommodations. See *United States* v. *McDermott*, 29 F.3d at 405 (prosecution under 18 U.S.C. 241 and 245(b)(2)(B) for conduct, including cross burning, intended to interfere with African-Americans' use of public park).

also be intended to express an idea or viewpoint. That is because the statutes are directed at conduct, not speech, although they may sometimes be violated by acts that have an expressive component.

2. In *R.A.V.*, the Court distinguished laws directed at speech, such as the ordinance in that case, from laws directed at conduct, distinct from its expressive content. 505 U.S. at 389. The Court explained that, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a [particular] idea or philosophy." *Id.* at 390. Thus, "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *Id.* at 385; cf. *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements.") (citations omitted). A statute directed at conduct may even be violated by words alone without raising First Amendment concerns. See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

The Court noted that a law directed at conduct, without regard to its expressive content, may "incidentally" encompass "a particular content-based subcategory of a proscribable class of speech." *R.A.V.*, 505 U.S. at 389. The Court made clear that such laws, in contrast to the one in *R.A.V.*, do not involve unconstitutional content discrimination. The Court identified several federal civil-rights laws as examples of such permissible regulations. Thus, "Title VII's general prohibition against sexual discrimination in

employment practices"—a regulation of conduct—may be violated by, among other things, "sexually derogatory 'fighting words.'" *Id.* at 389-390 (citing 42 U.S.C. 2000e-2; 29 C.F.R. 1604.11 (1991)). The Court also cited 18 U.S.C. 242, 42 U.S.C. 1981, and 42 U.S.C. 1982 as examples of constitutionally permissible regulations. 505 U.S. at 389-390.

In *Mitchell*, the Court upheld a statute that provided an enhanced criminal penalty if the defendant targeted his victim on the basis of race. In rejecting a First Amendment challenge to the statute, the Court reiterated the distinction between laws directed at speech and laws directed at conduct, explaining that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression * * *, the statute in this case is aimed at conduct unprotected by the First Amendment." 508 U.S. at 487. It was of no constitutional significance that the statute reached conduct, such as the assault in that case, that could be viewed as an expression of the perpetrator's views toward a particular race, because "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact * * * are entitled to no constiutional protection." *Id.* at 484. The Court also noted that *R.A.V.* had "cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct." *Id.* at 487.

3. The civil-rights statutes under which the United States prosecutes cross burning, like the federal civil-rights statutes that the Court identified in *R.A.V.* and *Mitchell*, are directed at conduct, distinct from any idea or viewpoint that it might express. 508 U.S. at 487. As the Court recognized in those cases, such statutes may reach words or expressive acts without violating the First Amendment. See *R.A.V.*, 505 U.S. at 389-390.

As noted, 42 U.S.C. 3631, the principal statute used by the United States to prosecute cross burning, prohibits *any* use

of "force or threat of force" to "willfully injure[], intimidate[] or interfere[] with" a person because of, *inter alia*, his "race" and his "occupying * * * any dwelling." 42 U.S.C. 3631(a). It makes no difference whether such conduct is intended to express an idea or viewpoint as well as to "injure[], intimidate[] or interfere[] with" a victim. Section 3631 applies equally to an assault committed in secrecy, see, *e.g.*, *United States* v. *Wood*, 780 F.2d 955 (11th Cir.) (forcible entry into home, beatings, death threats), cert. denied, 476 U.S. 1184 (1986); *United States* v. *Johns*, 615 F.2d 672 (5th Cir.) (firing guns into home), cert. denied, 449 U.S. 829 (1980), and to a cross burning committed in public view, provided that the defendant acted with the requisite intent. Thus, Section 3631 "is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech." *United States* v. *Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994); accord *United States* v. *Stewart*, 65 F.3d 918, 928-929 (11th Cir. 1995) (describing Section 3631 as "target[ing] unprotected conduct—willful interference with housing rights"—that "the government may regulate without violating the First Amendment"), cert. denied, 516 U.S. 1134 (1996).

Similarly, 18 U.S.C. 241 and 42 U.S.C. 1982, which are used together to prosecute cross-burning conspiracies, are regulations directed at conduct. Section 241 "punish[es] *any* * * * conspiracy to threaten or to intimidate, violating the statute[] regardless of the viewpoint guiding the action." *J.H.H.*, 22 F.3d at 825. Section 1982, which secures certain rights with respect to real and personal property against discrimination based on race, is specifically mentioned in *Mitchell*, 508 U.S. at 487, and *R.A.V.*, 505 U.S. at 389-390, as a constitutional regulation of conduct, without regard to its expressive content.

Both 42 U.S.C. 3631 and 18 U.S.C. 241 are analytically indistinguishable from statutes that this Court has described

as regulations directed at conduct. One statute so described by the Court is 18 U.S.C. 242, which was an example given in *R.A.V.*, 505 U.S. at 389-390, and *Mitchell*, 508 U.S. at 487. Section 242, which applies to those acting under color of law, prohibits "willfully subject[ing] any person * * * to the deprivation of any [federal] rights, privileges or immunities." Similarly, Section 3631 and Section 241 are directed at conduct intended to interfere with the exercise of federal rights, not at the message that the conduct may be intended to convey.

Section 3631 and Section 241 also resemble 18 U.S.C. 112(b), a statute that the Court viewed as constitutional in *Boos* v. *Barry*, 485 U.S. 312, 326 (1988). Section 112(b) prohibits "willfully * * * intimidat[ing], coerc[ing], threaten-[ing], or harass[ing] a foreign official or an official guest or obstruct[ing] a foreign official in the performance of his duties," or attempting to do so. 18 U.S.C. 112(b)(1) and (2). In *Boos*, the Court noted the "constitutionally significant" differences between 18 U.S.C. 112(b) and the statute at issue in that case, which prohibited displays designed, *inter alia*, to bring a foreign government, its officials, its policies, or its views into "public odium" or "public disrepute." 485 U.S. at 316, 326. The Court explained that Section 112(b), in contrast to the statute at issue, "is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects" of "intimidat[ing], coerc[ing], threaten[ing], or harass[ing]" a foreign official or guest. *Id.* at 326. *Boos* thus reinforces the conclusion that a statute that prohibits acts of intimidation, threats, harassment, and other such interference, without regard to their expressive content, is a constitutionally permissible regulation of conduct, "including speech." *Ibid.*

4. It is thus clear that the federal statutes that have been used to prosecute cross burning are aimed at conduct, not expressive content. The scope of conduct prohibited by

Section 3631, for example, includes both "force" and "threats," and "threats of violence are outside the First Amendment," *R.A.V.*, 505 U.S. at 388, insofar as they are "true threats." See *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam). *R.A.V.* indicated that, even though threats are unprotected, a statute that singled out certain threats based on the ideas or viewpoints that they sought to express would raise a distinct First Amendment issue. See 505 U.S. at 388 ("the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities"). But the federal statutes that have been used to prosecute cross burning do not make such content distinctions. Section 3631 punishes all "threats of force" that are used to injure, intimidate, or interfere with a person "because of" his race, color, religion, etc., and "because of" his exercise of federal housing rights. 42 U.S.C. 3631(a). The statute therefore singles out threats made because of the defendant's motives or reasons for acting, not because of the content of the threat. A threat using any language or any means of expression is covered, if made for the prohibited reasons. That approach raises no First Amendment issue. See *Mitchell*, 508 U.S. at 487 (upholding enhanced penalty for bias-motivated crime because "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge").[7]

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[7] The Virginia Supreme Court stated that "a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment." Pet. App. 9. That statement has no application to the federal statutes under which cross burning has been prosecuted (which do not focus on the content of speech), and it is overbroad even if intended simply as a description of *R.A.V.*, which did not pronounce an absolute rule forbidding content discrimination. But to the extent that the statement suggests that a statute cannot prescribe intimidation or threats

In sum, 42 U.S.C. 3631 and 18 U.S.C. 241 are properly understood as regulations directed at conduct, which may constitutionally encompass acts, such as cross burning, that may also express an idea or viewpoint. Accordingly, whether or not a State may prosecute intimidation by cross burning under a statute that exclusively applies to that activity, a State may do so under a statute of more general application that is modeled on the federal statutes discussed above.

II. A STATE MAY PERMISSIBLY REGULATE CROSS BURNING, WHEN INTENDED TO THREATEN OR INTIMIDATE, UNDER A STATUTE THAT APPLIES EXCLUSIVELY TO THAT CONDUCT

The Virginia statute does not prohibit *all* cross burning, or a content-based subcategory of cross burning. Rather, the statute prohibits cross burning "with the intent of intimidating any person or group of persons," when conducted "on the property of another, a highway or other public place." Va. Code Ann. § 18.2-423 (Michie 1996). The statute reaches all such incidents of cross burning regardless of the ideas, if any, that they may be intended to communicate. Those features of the statute are constitutionally significant for two reasons. First, the statute may be viewed as a regulation directed at conduct—intimidation—as distinguished from a regulation directed at expression.

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directed at a person because of his race, religion, or another such characteristic or because of the defendant's reasons for acting, the statement is inconsistent with this Court's understanding that "a prohibition of fighting words that are directed at certain persons or groups * * * would be *facially* valid if it met the requirements of the Equal Protection Clause." *R.A.V.*, 505 U.S. at 392, and with this Court's conclusion in *Mitchell*, 508 U.S. at 486-487, that imposition of an enhanced penalty when the defendant selects his victim based on race or another protected characteristic does not violate the First Amendment.

Alternatively, even if the statute is viewed as a selective regulation of proscribable expression, the statute does not violate the First Amendment, because it presents no danger of impermissible content or viewpoint discrimination. The same content-neutral reasons that would justify a prohibition of all intimidating expression also justify a selective prohibition of intimidation by cross burning.

A. The Virginia Statute Is A Regulation Of Conduct—The Intentional Use Of Cross Burning As A Tool Of Intimidation—Not A Regulation Of Expression

1. The Virginia statute, like the federal statutes discussed above, is appropriately viewed as a regulation of conduct—specifically, the intentional use of a burning cross as "an instrument of intimidation." *Capitol Square*, 515 U.S. at 770-771 (Thomas, J. concurring). It applies only to cross burning that is undertaken "with the intent of intimidating any person or group of persons," and to all such cross burning whether or not it is also intended to express an idea or philosophy. Such a statute cannot reasonably be viewed as being directed at the suppression of free expression.

As explained above (at 11-12), intimidation is not protected speech. It is conduct intended to "put a person or group of persons in fear of bodily harm." Pet. App. 66-67 (jury instruction in respondent Black's case); see *Sutton* v. *Commonwealth*, 324 S.E.2d at 670 ("[i]ntimidation * * * means putting a victim in fear of bodily harm"). A law against intimidation is thus similar to a law against treason, or fraud, or blackmail—a law that may be violated by words, but that is "directed not against speech but against conduct." *R.A.V.*, 505 U.S. at 389 (discussing law against treason).[8]

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[8] The state cross-burning statutes invalidated in two cases cited by the Virginia Supreme Court (Pet. App. 13-14)—*State* v. *Ramsey*, 430 S.E.2d 511 (S.C. 1993), and *State* v. *Sheldon*, 629 A.2d 753 (Md. 1993)—did

The Virginia statute thus differs in critical respects from the ordinance in *R.A.V.* The Commonwealth has not sought to regulate speech that arouses "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender," as did the provision at issue in *R.A.V.* 505 U.S. at 393. The distinctive harms in that case, the Court concluded, were the product of the expression of "a distinctive idea, conveyed by a distinctive message." *Ibid.* Here, Virginia has selected for prohibition, not a "distinctive idea" or "a distinctive message," but a distinctive form of conduct —intentional intimidation through cross burning— that has historically served as a precursor to violent action. See pp. 2-5 & note 2, *supra.* It does not matter whether the defendant selected that mode of intimidation to express racial hatred or simply to take advantage of the intense fear that it induces. In either case, cross burning has a unique potential to cause fear, disruption, and the potential for violence, and it is for that reason that Virginia has singled out cross burning with the intent to intimidate for special proscription. In regulating that specific act, Virginia protects against a form of conduct that has a particularized capacity to instill in its victims a well-grounded fear that physical violence will follow.

2. The Virginia statute, in contrast to the federal statutes discussed above, applies to a single mode of intimidating conduct, intimidation by cross burning. Cross burning is not in all instances an expressive activity. See pp. 13-14 note 5, *supra.* But by focusing on a particular type of activity that often is expressive of an idea or viewpoint, the Virginia statute, although directed at conduct, may require scrutiny under the First Amendment in a way that the federal statutes do not.

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not contain an "intent to intimidate" element, and for that reason are unlike the statute at issue here.

To that extent, the Virginia statute is appropriately analyzed under the intermediate scrutiny standard of *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968), as a regulation of a "nonspeech" element (*i.e.*, intentional intimidation) of conduct that may contain both "speech" and "nonspeech" elements. See *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 703 (1986) (noting that the Court has applied the *O'Brien* analysis to "cases involving government regulation of conduct that has an expressive element"); see also, *e.g.*, *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (applying *O'Brien* standard to regulation of public nudity); accord *id.* at 310 (Souter, J., concurring in part and dissenting in part); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298-299 (1984) (applying *O'Brien* standard to regulation prohibiting sleeping in public parks).[9]

The Virginia statute withstands First Amendment scrutiny under the *O'Brien* standard. See *O'Brien*, 391 U.S. at 377 (statute must promote an "important or substantial government interest," which is "unrelated to the suppression of free expression," and restrict such expression only to the extent "essential to the furtherance of that interest"). The statute serves the government's important, indeed compelling, interest in preventing activity that creates fear, disruption, and the potential for violence. See pp. 28-29, *infra.* Such an interest is unrelated to the suppression of any idea

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[9] See also *Hernandez* v. *Commonwealth*, 406 S.E.2d 398, 400-401 (Va. Ct. App. 1991) (sustaining under *O'Brien* standard Virginia statute prohibiting wearing of masks to conceal identity as applied to Ku Klux Klan member), habeas corpus denied *sub nom. Hernandez* v. *Superintendent*, 800 F. Supp. 1344 (E.D. Va. 1992), appeal dismissed, 8 F.3d 818 (4th Cir. 1993) (Table), cert. denied, 510 U.S. 1119 (1994); Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* 80-109 (1999) (suggesting mode of analysis similar to *O'Brien*'s for distinguishing "prosecutable bias crimes," including cross burning intended to threaten or intimidate, from "protected racist speech").

or viewpoint that a particular act of cross burning may be intended to express. Cf. *People* v. *Steven S.*, 31 Cal. Rptr. 2d 644, 651 (Ct. App. 1994) ("the expressive element of an unauthorized cross burning on another person's property is incidental at best"). The statute does not suppress any more expression than is necessary to prevent intimidation, as reflected in its application only to cross burning for the purpose of intimidation, and not to cross burning for other purposes or cross burning for any purpose on one's own property.[10]

3. The First Amendment requires content neutrality only when the government regulates expression, as such, or when the government regulates expressive conduct *because* of its expressive element. Otherwise, a statute may focus, subject only to equal protection constraints, on "the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955), rather than on all phases of the problem at the same time and to the same extent. Cf. *Friedman* v. *Rogers*, 440 U.S. 1, 15 n.14 (1979) (observing that, in regulating commercial speech to prevent misleading or deceptive practices, "[t]here is no requirement that the State legislate

[10] The final sentence of the statute—which provides that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons"—raises distinct issues concerning whether the statute is sufficiently narrowly tailored. There is no constitutional vice in permitting a jury to infer an intent to intimidate from speech or expressive conduct considered in light of all the circumstances of the case. See *Mitchell*, 508 U.S. at 489 ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). If, however, the provision allows a jury to find, merely from the fact that the defendant burned a cross, that he acted with the intent to intimidate, the statute could reach cross burning that was intended only to express an idea or viewpoint. No analogous provision appears in any federal statute that is used to prosecute cross burning. See p. 2 note 1, *supra*.

more broadly than required by the problem it seeks to remedy") (citing *Williamson*); *O'Brien*, 392 U.S. at 375 (sustaining statute that prohibited the destruction of draft cards but not other government-issued documents, the destruction of which could produce comparable harms).

Thus, when regulating the conduct of intentional intimidation, in furtherance of an interest unrelated to the suppression of expression, a State may focus on intimidation in one context. Virginia may, for example, prohibit intimidation by burning a cross without, as the Virginia Supreme Court suggested (Pet. App. 14), also prohibiting intimidation by burning a circle or a square. That is because Virginia's valid concerns with the unique evils of intimidating cross burning respond to a genuine threat to social order, a threat not found in other contexts. The Commonwealth's focus on the actual problem that it has encountered raises no concern that it is actually seeking to suppress disfavored ideas or views.

4. The Virginia statute is unlike the Texas flag-burning statute that was invalidated in *Texas* v. *Johnson*. There, the Court held that the *O'Brien* standard was inapplicable because the State offered no valid interest unrelated to the suppression of free expression to justify the statute. 491 U.S. at 407. The Court concluded that Texas's asserted interest in preventing breaches of the peace was unsupported by any evidence that flag burning would provoke a violent response. *Id.* at 407-410. And the Court concluded that Texas's interest in preserving the symbolic value of the flag was related to the suppression of free expression. *Id.* at 410. Here, in contrast, the Commonwealth's interest in preventing coercive conduct that instills fear in its citizens is inherent in the statute's limitation to cross burning with the intent to intimidate. The historical accuracy of Virginia's premise that such cross burning warrants proscription is beyond question. See pp. 2-5 & note 2, *supra*.

The Virginia statute is also unlike the federal Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, which the Court declined to review under the *O'Brien* standard in *United States* v. *Eichman*, 496 U.S. 310, 315 (1990). In that case, the Court held that the government's asserted interest, to protect the physical integrity of the American flag, was "related to the suppression of free expression," because it "rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals." *Id.* at 315-316. Again, the Virginia statute is justified by the Commonwealth's interest in protecting its citizens from intimidation, which is distinct from any interest in preventing the use of cross burning as a symbol of an idea or philosophy.[11]

B. The Virginia Statute Poses No Danger Of Idea Or Viewpoint Discrimination Because The Same Reasons That Justify A Ban Of All Intimidating Expression Justify A Ban Of Intimidation By Cross Burning

The Virginia statute, even if viewed as a selective regulation of proscribable expression, does not violate the First Amendment under *R.A.V.* The government may constitutionally proscribe all threatening and intimidating expression. See *Watts* v. *United States*, 394 U.S. at 707. It also may distinguish within that category, provided that it does so for a reason that is sufficiently content-neutral. See

[11] The federal civil-rights statutes discussed above, if viewed as regulations of a "nonspeech" element of expressive conduct in their application to cross burning, would also satisfy the *O'Brien* standard. Those statutes serve the government's important interest in protecting citizens against interference in the exercise of federal rights. That interest is unrelated to the suppression of free expression. The statutes are narrowly tailored to reach only those cross burnings that are intended to intimidate, leaving ample alternative means for the expression of views antagonistic to the persons and rights that the statutes protect. See *Hayward*, 6 F.3d at 1250-1251 (holding that Section 3631 satisfies the *O'Brien* test in prosecution involving cross burning).

R.A.V., 505 U.S. at 388. A prohibition of intimidation by cross burning is justified for the same content-neutral reasons that would justify a prohibition of all threatening or intimidating expression.

In *R.A.V.*, the Court explained that the First Amendment's prohibition against content discrimination in the regulation of "fighting words" and other categories of proscribable speech is "not absolute." 505 U.S. at 387. The Court identified various instances in which such discrimination is permissible because it poses no threat of driving certain ideas or viewpoints from the marketplace. One such instance is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech of speech at issue is proscribable." *Id.* at 388. That is because "[s]uch a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Ibid.* Thus, Congress could prohibit only threats of violence made against the President, "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." *Ibid.*

The same analysis applies to a statute that prohibits only intentional intimidation by cross burning. A statute that prohibited *all* intimidating speech (*i.e.*, speech intended to coerce its victims by putting them in fear of bodily harm) would be permissible under the First Amendment. Intimidating speech, like the threatening speech discussed in *R.A.V.*, is "outside the First Amendment," and may be prohibited for the same content-neutral reasons: to "protect[] individuals from the fear of violence, from the disruption

that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

Those reasons have "special force," 505 U.S. at 388, when applied to intentional intimidation by cross burning. A State could properly conclude that cross burning, when engaged in to intimidate, has a unique potential for instilling fear in its victims, disrupting the life of the community, and precipitating violent or other unlawful conduct. As history demonstrates, cross burning, as contrasted with other intimidating expression, has a particularly strong association with acts of vigilantism and violence. See pp. 2-5 & note 2, *supra*; see also, *e.g.*, *Steven S.*, 31 Cal. Rptr. 2d at 653 ("Given the role of the Ku Klux Klan in our nation's history, * * * a malicious cross burning * * * can be uniquely threatening, fearsome, and provocative."). Because cross burning typically targets its victims based on their race (or ethnicity or religion), its intimidating impact is particularly likely to be felt not only by its immediate victims, but also by others in the community who are of the same race (or ethnicity or religion). See *Symposium: Civil Rights Law in Transition*, 27 Fordham Urb. L.J. 1109, 1173 (Apr. 2000) (Professor Frederick M. Lawrence) ("[S]tudies have shown that in the aftermath of cross burnings on the lawn of a black family, other black families in the area * * * respond as if they themselves were attacked, of actual personal victimization. This is evident with other ethnic and other groups as well. Consequently, bias crimes affect the target community in such a way that there is no equivalent with parallel crimes."); S. Rep. No. 721, 90th Cong., 1st Sess. 4 (1967) (observing that violence or the threat of violence "has been used against [some] Negroes * * * in order generally to intimidate and deter all Negroes in the exercise of their rights"). The impact of intimidating cross burning on racial or other groups within the community heightens the injury that such conduct causes and justifies its special prohibition. Cf.

Mitchell, 508 U.S. at 488 (special harms of bias-motivated crimes "provide[] an adequate explanation for [a State's] penalty-enhancement provision over and above mere disagreement with the offender's beliefs or biases").[12]

Intimidation by cross burning, in light of its history, is therefore singularly proscribable for the same reasons that intimidating expression is generally proscribable. A statute such as Virginia's presents "no significant danger of idea or viewpoint discrimination." *R.A.V.*, 505 U.S. at 388.[13]

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[12] It would be especially inappropriate to presume, in light of the historical context, that Virginia enacted the statute for the impermissible purpose of suppressing expression, rather than for the permissible purpose of protecting its citizens from a particularly virulent form of intimidation. As noted, the statute was originally adopted in 1952, at a time when many of the views that a person may seek to advocate by burning a cross, such as white supremacy and racial separation, were reflected in state law. See, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); *Loving* v. *Virginia*, 388 U.S. 1, 7 (1967) (characterizing as "obviously an endorsement of the doctrine of White Supremacy" the justifications offered by Virginia Supreme Court in 1955 to uphold the state anti-miscegenation statute).

[13] The federal civil-rights statutes discussed above are not selective regulations of proscribable expression. Even if they were so viewed, however, they would be permissible for reasons similar to those discussed in the text. Cross burning or other expressive activity intended to intimidate a person for exercising his federal right to occupy a dwelling may cause particularly intense fear and disruption. Cf. *Frisby* v. *Schultz*, 487 U.S. 474, 486-487 (1988) (noting the uniquely disturbing impact of picketing in the residential context). And, because the activity is directed at a victim because of his race (or ethnicity, religion, etc.), it is likely to instill fear not only in that victim, but also in others of the same group.

CONCLUSION

The judgment of the Virginia Supreme Court should be reversed to the extent that it holds that a State cannot exclusively proscribe cross burning with the intent to intimidate.

Respectfully submitted.

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AUGUST 2002

APPENDIX

1. Section 241 of Title 18, U.S.C., provides, in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

* * * * *

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

2. Section 242 of Title 18, U.S.C., provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one years, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a

dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

3. Section 245(b) of Title 18, U.S.C., provides, in pertinent part:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any

inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of

such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

* * * * *

4. Section 1982 of Title 42, U.S.C., provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

5. Section 3631 of Title 42, U.S.C., provides:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined under title 18 or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under title 18 or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse; or an attempt to kill, shall be fined under title 18 or imprisoned for any term of years or for life, or both.

6. The Virginia cross-burning statute, Va. Code Ann. § 18.2-423 (Michie 1996), provides:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Supreme Court U.S.
FILED
AUG 9 2002
OFFICE OF THE CLERK

No. 01-1107

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, and JONATHAN O'MARA,

Respondents.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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29 pp

QUESTIONS PRESENTED

1) Does Virginia's statute prohibiting burning a cross with intent to intimidate violate the rule of *R.A.V.* v. *St. Paul*, by discriminating between types of threats on the basis of content unrelated to the state's legitimate interest in protecting people from threats?

2) Does the statute prohibit speech other than constitutionally proscribable threats? If so, are those applications severable?

3) After severing any severable, invalid applications, is the statute substantially overbroad?

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IN THE

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vs.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, and JONATHAN O'MARA,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a statute enacted to protect the people from terrorist threats. The Supreme Court of Virginia held that the First Amendment precludes enforcement of this

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   All parties have given written consent to the filing of this brief.

statute in the present case even though the defendants' act is not protected expression. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On May 2, 1998, defendants Richard Elliott and Jonathan O'Mara, along with David Targee, attempted to burn a cross in the back yard of James S. Jubilee. Mr. Jubilee is a neighbor of Elliott's, and there had been a dispute between them arising from Elliott firing guns in his back yard. *Black* v. *Commonwealth*, 262 Va. 764, 768, 553 S. E. 2d 738, 740 (2001).

O'Mara pleaded guilty to attempted cross burning and conspiracy to commit cross burning, Va. Code § 18.2-423, but reserved the right to appeal on the issue of the constitutionality of that statute. Elliott went to trial on the same charges and was convicted by a jury of attempt but acquitted of conspiracy. 262 Va., at 769, 553 S. E. 2d, at 740-741. The Court of Appeals affirmed. *O'Mara* v. *Commonwealth*, 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Defendant Barry Black burned a cross at a Ku Klux Klan rally, which was held on private property with permission of the owner. *Black*, 262 Va., at 782, 553 S. E. 2d, at 748 (Hassell, J., dissenting). A neighbor testified that she feared arson of her home and harm to her children. *Id.*, at 782, 553 S. E. 2d, at 749. The Court of Appeals affirmed in an unpublished opinion, relying on its *O'Mara* opinion. See *id.*, at 769, 553 S. E. 2d, at 741 (majority); App. to Pet. for Cert. 46.

The Virginia Supreme Court consolidated the cases and reversed in a 4-3 decision. "We conclude that . . . the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad." 262 Va., at 768, 553 S. E. 2d, at 740.

SUMMARY OF ARGUMENT

When a court invokes the First Amendment "overbreadth" doctrine, it refuses to enforce a statute in the case before it, even though the statute does not conflict with the Constitution as applied to that case. This result is contrary to the basis for judicial review, contrary to the people's right of self-government, and of doubtful legitimacy. If "overbreadth" is not to be abandoned altogether, it should be applied sparingly and as a last resort.

The statute at issue in this case prohibits threats, which are not protected speech. It does distinguish some threats from others on the basis of content, but it does so on a permissible basis. Cross burning is a particularly threatening type of threat. The fact that an otherwise valid statute has a greater impact on one group of speakers than another does not render it invalid.

The Virginia Supreme Court conducted its overbreadth analysis without considering severability. This is an error of federal law under *Brockett* v. *Spokane Arcades*. The determination of whether a statute actually is severable is a question of state law, not reviewable by this Court, but no such determination was made here. *If* this statute has any invalid applications potentially rendering it overbroad, severability must be considered before deciding whether any unseverable, invalid applications are substantial in comparison to the valid applications.

ARGUMENT

I. The overbreadth doctrine should be used sparingly, and only as a last resort.

A. The Overbroad Overbreadth Doctrine.

Defendants Elliott and O'Mara committed the act of which they were convicted. The state *may* constitutionally punish this act. The state *has* passed a statute clearly prohibiting and punishing this act. Yet the Supreme Court of Virginia nonethe-

less held that the Constitution of the United States prohibits the enforcement of that statute in this case. Such a result would surely strike Jane and John Q. Public as odd. The logic of the overbreadth doctrine often leads to extremes. See *Lewis* v. *New Orleans*, 415 U. S. 130, 136-137 (1974) (Blackmun, J., dissenting). When that happens, it is time to reexamine the premises.

The essence of an overbreadth challenge is that even though the party before the court has committed an act which the legislature can and has prohibited, he should nonetheless escape punishment because the same statute may, in other contexts, chill the exercise of First Amendment rights. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980). Generally, such an argument requires the court to deal with hypothetical situations "and pass upon . . . constitutionality . . . as an abstract question." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Such a course is unwise and possibly illegitimate. In the present case, there is a third defendant whose case is joined for the purpose of appeal who has at least a plausible argument that the statute cannot be constitutionally applied to his conduct. While that fortuity mitigates the abstraction problem, it still leaves the problem of formulating a constitutional rule broader than needed to cover the case before the court.

> "That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to

> be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Ibid.*

Liverpool's statement that the Court has "rigidly adhered" to these rules is no longer true. The overbreadth doctrine routinely involves both advance rulings on constitutionality and the formulation of rules broader than necessary for decision. These deviations have not gone unnoticed by the Members of the Court. Individual opinions have questioned both the legitimacy and the wisdom of the overbreadth doctrine. See *Lewis*, 415 U. S., at 136-142 (Blackmun, J., dissenting); *New York* v. *Ferber*, 458 U. S. 747, 780-781 (1982) (Stevens, J., concurring in the judgment); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 976-978 (1984) (Rehnquist, J., dissenting). Majority opinions have also expressed reservations. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610-611 (1973).

These reservations are well-founded. If the overbreadth doctrine is not to be abandoned altogether, it should at the very least be kept on a tight leash.

B. The Legitimate Scope of Judicial Review.

Although people speak freely of courts "striking down" statutes, nowhere in the Constitution is such a function assigned to the judicial branch. Instead, the Constitution establishes a hierarchy of laws, and the judiciary must necessarily apply the higher law in preference to the lower one when the laws conflict. That preference is explicit in the case of state statutes, U. S. Const., Art. VI, cl. 2, and implicit in the case of federal statutes.

The legitimacy of judicial review is well established in cases where the Constitution and the statute actually command different results in the case before the court. See, *e.g.*, *Bayard* v. *Singleton*, 1 N. C. 15, 18 (1787) (jury trial); *United States* v. *Eichman*, 496 U. S. 310, 319 (1990) (flag burning). In these

situations, the court must decide whether the statute conflicts with the Constitution because and *only* because there is no other way to decide the case.

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> "So if a law be in opposition to the constitution; *if both the law and the constitution apply to a particular case*, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> "If, then, the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern *the case to which they both apply*." *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803) (emphasis added).

Legitimate judicial review is limited to the necessity of deciding cases, as outlined in *Marbury*. *Broadrick*, 413 U. S., at 611. That necessity is limited to cases to which "both the law and the constitution apply." If the Constitution does not apply to a case, then the case is governed solely by the statute, and there is no constitutional issue to decide.

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [Citation.] These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system *courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws*." *Id.*, at 610-611 (emphasis added).

This is not a matter of policy; this is a matter of the boundaries of the judicial function. It is a matter of usurpation of "the prerogative of democratic government." *Lewis*, 415 U. S., at 140 (Blackmun, J., dissenting); see also *Ferber*, 458 U. S., at 767-768, n. 20 (Article III implications of the *Liverpool* principle).

The overbreadth doctrine is sometimes justified by "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). But does the end justify the means?

Surely no one would contend that a court could reach out and "strike down" a statute on its own initiative, with no case before it at all. The patent illegitimacy of such a decree requires that the statute be tolerated until *someone* brings a challenge. Why can it not be further tolerated until a challenge is brought in a case where the constitutional right in question is *genuinely* at issue? Further, once such a challenge is brought, why is it necessary to declare the statute invalid any further than is necessary to avoid conflict with the Constitution in actual application?

With modern procedures, there is no need to await a criminal prosecution. See *Munson*, 467 U. S., at 977-978 (Rehnquist, J., dissenting). While the cost of declaratory and injunctive relief is a concern, there appears to be a more than adequate supply of litigation. The panhandlers of New York's subway obtained representation. See *Young* v. *New York City Transit Auth.*, 903 F. 2d 146, 147 (CA2 1990). When the State of Washington passed a "moral nuisance" statute, a complaint was on file within days. *Brockett* v. *Spokane Arcades, Inc.*, 472

U. S. 491, 507 (1985) (O'Connor, J., concurring). Even the Pledge of Allegiance has attracted a willing and able opponent in litigation. See *Newdow* v. *U. S. Congress*, 292 F. 3d 597 (CA9 2002) (stay granted June 27, 2002).

The notion that the First Amendment is suffering from a dearth of litigants seems out of touch with reality. Even if necessity could ever justify an otherwise improper constitutional edict, which is doubtful, a stronger showing of necessity should be required.

C. Collateral Damage.

The invalidation of an entire statute legalizes conduct that the people, through the democratic process, have deemed it necessary to prohibit. Even if the legislature enacts a new statute, it cannot do so retroactively. See U. S. Const., Art. I, § 10. Given that the legislative process is constructed to make blocking legislation easier than enacting legislation, it is not always possible to enact a new statute even if favored by a majority. It may be true that "if some constitutionally unprotected speech [or conduct] must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Houston* v. *Hill*, 482 U. S. 451, 462, n. 11 (1987). Whether the price is *worth* paying, however, begs the question of whether the price *needs* to be paid.

This Court has been reluctant to apply the overbreadth doctrine where the statute has a substantial number of valid applications. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Furthermore, the overbreadth doctrine must be carefully tied to the circumstances warranting its exception to the usual rules of constitutional adjudication. *New York* v. *Ferber*, 458 U. S., at 769. Overbreadth is a "last resort." *Ibid.* (quoting *Broadrick*, 413 U. S., at 613).

When the legislative branch regulates in the area of fundamental rights, the judiciary admonishes that the least drastic means must be employed. See, *e.g.*, *Shelton* v. *Tucker*, 364

U. S. 479, 488 (1960). The judiciary should heed the same advice. The right of self-government is a fundamental right. See U. S. Const., Art. IV, § 4; The Declaration of Independence, para. 2 (1776). The overbreadth doctrine should be invoked, if at all, only when no less drastic interference with democratic government is available.

This is not such a case. The principal scope of the statute is the prohibition of threats, which lie outside the protection of the First Amendment. If the statute does prohibit any protected expression, a court must ask if those applications are severable before applying the overbreadth doctrine. If there is any remaining overbreadth at that point, it is not substantial.

II. The statute validly prohibits unprotected threats.

A. Proscribable Threats.

A statute which prohibits a threat is prohibiting speech or expressive conduct on the basis of its content. This Court's previous cross-burning case, *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), discussed the constitutional limits of such a prohibition.

> "Content-based regulations are presumptively invalid. [Citations.] From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *Id.*, at 382-383 (quoting *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)).

Threats are one such limited area. See *id.*, at 388. Threats as such contribute little or nothing to the marketplace of ideas. It is difficult to imagine any idea expressed by a threat, other than the intent to commit a crime, that could not be expressed without a threat. A government which actually wanted to "drive certain ideas or viewpoints from the marketplace,"

Simon & Schuster, Inc. v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991), would find such a prohibition a particularly ineffective means toward that end.

On the other side, "the social interest in order" weighs particularly heavy in the case of threats. In most free speech cases, the harm caused by the speech is a diffuse one, affecting society in general but not causing specific harm to a particular individual or a small group of people, such as a family. See, *e.g.*, *United States* v. *Eichman*, 496 U. S. 310, 312 (1990) (flag burning); *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. __, 152 L. Ed. 2d 670, 681, 122 S. Ct. 1728, 1734 (2002) (plurality opinion) (secondary effects of "adult" businesses); *Brandenburg* v. *Ohio*, 395 U. S. 444, 446 (1969) (*per curiam*) (vague reference to possibility of "some revengance"). A threat directed to a specific person is quite different. See Reed, The State Is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence, 38 Am. Bus. L. J. 177, 197-198 (2000). It causes that person to live in fear. It may cause the person to forego the exercise of his right to vote or to live in the neighborhood of his choice. Few, if any, kinds of speech cause more acute harm merely by their utterance than do threats.

The reduced danger of idea suppression and the direct harm that they cause make threats a distinct analytical category, different from both the abstract advocacy of violent action and "fighting words." Statutes directed at advocacy, such as those at issue in *Brandenburg* and *Dennis* v. *United States*, 341 U. S. 494, 496 (1951), present a far greater danger to the expressions of ideas. Revolutionary ideology cannot be expressed without at least bordering on the violation of such statutes. A prohibition on threatening people, in contrast, is easily avoided by anyone interested only in expressing ideas.

An equally important distinction is that neither advocacy nor fighting words *directly* cause any serious harm, while threats do. Advocacy of violence and fighting words cause

harm only indirectly, by inciting another person to violence. The "substantive evil[]," see *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), which justifies the prohibition is only the act, not the advocacy of it. A time interval between advocacy and act attenuates the connection and weakens the state's interest in prohibiting the advocacy. See *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925) (Holmes, J., dissenting). Thus, only incitement to *imminent* violence may be prohibited. See *Brandenburg*, 395 U. S., at 447. A threat causes harm to its target by itself, immediately upon receipt, regardless of whether it is ever carried out and regardless of whether it is conditional. See *United States* v. *Gilbert*, 884 F. 2d 454, 458 (CA9 1989); Reed, 38 Am. Bus. L. J., at 197-198. The harm threatened need not be immediate or unconditional before the state may prohibit the threat, because the threat itself causes substantial harm immediately and unconditionally.

This Court has repeatedly recognized that "threats of violence are outside the First Amendment . . . ." *R. A. V.*, 505 U. S., at 388; *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 773 (1994). However, this Court has not yet defined what is a proscribable threat. We know from *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*), that a statement which, in its context, was only "political hyperbole" is not a "true 'threat,' " but that case provides very little guidance beyond its specific facts. *Rankin* v. *McPherson*, 483 U. S. 378, 386-387 (1978) similarly acknowledges that threats may be proscribed, holds that the statement in question was not a threat, citing *Watts*, and sheds little additional light.

United States v. *Orozco-Santillan*, 903 F. 2d 1262, 1265 (CA9 1990) stated a test for a "true threat." "Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." Other circuits and state courts have adopted similar tests. See, *e.g.*, *United*

States v. *Fulmer*, 108 F. 3d 1486, 1491 (CA1 1997); *United States* v. *Khorrami*, 895 F. 2d 1186, 1192 (CA7 1990); *United States* v. *J. H. H.*, 22 F. 3d 821, 827-828 (CA8 1994); *In re Steven S.*, 25 Cal. App. 4th 598, 608, 31 Cal. Rptr. 2d 644, 648 (1994).

The only requirement is that a reasonable person in the position of the target would take the threat as a serious one. There is no requirement that the threat be immediate or unconditional, that the maker subjectively intend to carry it out, or even that he have the ability to do so. See *United States* v. *Mitchell*, 812 F. 2d 1250, 1256 (CA9 1987). Proscribable threats are not limited to bodily injury, notwithstanding some loose language in some cases. Serious threats to property may also be prohibited. See *McCalden* v. *California Library Ass'n*, 955 F. 2d 1214, 1217, 1222 (CA9 1992) (threat to property, First Amendment defense rejected). A threat to burn down a person's house if he does not move out of the neighborhood is surely within the power of the state to prohibit.

There can be no doubt that a reasonable person in Mr. Jubilee's position would take a burning cross on his property as an expression of a serious intent to do harm. Russell Jones, the target of the cross-burning in *R. A. V.* and *J. H. H.*[2] testified, "a cross burning represents 'a threat of death' to an African-American, a 'warning that you have to get out of this neighborhood . . . [or] you will be sorry.' " *J. H. H.*, 22 F. 3d, at 827. The Supreme Court of Florida noted that cross-burning "is one of the most virulent forms of 'threats of violence' . . . ." *State* v. *T. B. D.*, 656 So. 2d 479, 481 (1995). A cross burning directed at a specific target is an unprotected threat, well within the power of the state to prohibit.

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2. After this Court's decision in *R. A. V.*, the United States Attorney charged R. A. V. and his cohorts J. H. H. and L. M. J. under the federal civil rights laws. See *J. H. H.*, 22 F. 3d, at 824.

B. Content Discrimination.

The Virginia Supreme Court held that Virginia's cross-burning statute ran afoul of the rule of *R. A. V.* because it is "selective regulation of speech based upon content." *Black* v. *Commonwealth*, 262 Va. 764, 771, 553 S. E. 2d 738, 742 (2001) (capitalization omitted). This is an overly broad interpretation of *R. A. V.*

R. A. V. held that areas of speech that can be "regulated because of their constitutionally proscribable content" may not "be made the vehicle for content discrimination unrelated to their distinctively proscribable content." 505 U. S., at 383-384 (emphasis omitted). On the other hand, "content discrimination" is permitted "[w]hen the basis for [it] consists entirely of the very reason the entire class of speech at issue is proscribable . . . ." *Id.*, at 388. For example, the state may discriminate among obscene materials by the degree of obscenity. *Ibid.* Of particular relevance to this case, *R. A. V.* noted that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *Id.*, at 388-389. Analogously, a state may prohibit cross burning selectively if the degree of terror caused by this particular form of threat "is in its view greater there."

The distinction between valid content discrimination along the same dimension that makes the category proscribable in the first place and invalid discrimination based on some other aspect of the content is similar to the so-called "content-neutral" requirement for "time, place, or manner" restrictions. *Id.*, at 386.

> "And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements." *Ibid.* (emphasis in original).

The test for "time, place, or manner restrictions" is, in turn, substantially equivalent to the test for "expressive conduct" regulation. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). The corresponding prong of that test is that "the governmental interest is unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). Adapted to the present case, the test is whether the governmental interest in prohibiting cross-burning threats is related to the reason that threats in general are not protected speech.

Assessment of governmental interests and the purposes of legislation is a "hazardous matter." *Id.*, at 383. Laws have multiple effects. If one effect of a law is permissible and another is not, application of the test requires a court to identify which is the "purpose." This issue was confronted by the plurality in *Erie* v. *Pap's A.M.*, 529 U. S. 277, 289-292 (2000), a nude dancing case.[3]

In *Erie*, the state court had found two purposes—the legitimate purpose "to combat the negative secondary effects" of nude dancing and the illegitimate purpose of "suppressing the erotic message of the dance." *Id.*, at 291-292. That second purpose, the state court held, invalidated the statute. *Id.*, at 292. "A majority of the Court rejected that view in *Barnes*, and [the plurality did] so again" in *Erie*. *Ibid.* "[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Ibid.*; *O'Brien*, 391 U. S., at 383.

Given the burning cross's history as the symbol of the Ku Klux Klan, there are two obvious reasons for distinguishing a cross burning from other forms of threats—the greater terror it

3. Justices Scalia and Thomas concurred in the result on the broader grounds that regulation of nude dancing " 'is not subject to First Amendment scrutiny at all.' " *Id.*, at 307-308 (quoting *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 572 (1991) (Scalia, J., concurring in the judgment)). Hence, the plurality opinion is the holding of the court under the rule of *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

strikes into the hearts of its targets and its association with racist ideology. See *In re Steven S.*, 25 Cal. App. 4th 598, 606-607, 31 Cal. Rptr. 2d 644, 647 (1994). The first reason is plainly legitimate. Congress can legitimately distinguish threats to the President from other threats "since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." *R. A. V.*, 505 U. S., at 388 (citing *Watts*, 394 U. S., at 707). Beyond dispute, "protecting individuals from the fear of violence," *ibid.*, has "special force" when applied to a form of threat used by a large, notorious terrorist organization.

The "alleged illicit motive" in this case, cf. *Erie*, 529 U. S., at 292, is to suppress " 'the controversial racial and religious messages which [cross burnings] impart.' " *Black*, 262 Va., at 776, 553 S. E. 2d, at 745 (quoting *State* v. *Sheldon*, 332 Md. 45, 629 A. 2d 753, 757 (1993)). As an initial matter, the notion that the Virginia General Assembly of 1952 sought to suppress the segregationist ideology motivating the Klan's activities borders on absurd to one who lived there during the civil rights struggles of the 1950s and 1960s. This was a jurisdiction that maintained *de jure* segregated schools for a decade in defiance of *Brown* v. *Board of Education*, 347 U. S. 483 (1954).[4] It was the Klan's terrorist means, not its segregationist ends, that triggered widespread revulsion and motivated the 1952 legislature to enact this statute almost unanimously. See App. to Pet. for Cert. 100. "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R. A. V.*, 505 U. S., at 390.

The First Amendment does not require that an otherwise valid limitation on speech avoid disparate impact on different

4. Counsel for *amicus* attended public schools in Fairfax County, Virginia, from 1960 to 1971. The county maintained separate black and white schools through the 1964-1965 school year, and finally integrated in Fall 1965.

speakers. A restriction on the volume of music has a much greater impact on hard rockers than on string quartets, but the limitation is valid nonetheless. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The prohibition on draft card burning obviously impacted the expressive conduct of those who opposed the Vietnam War and not those who favored it, but the prohibition was still valid. See *O'Brien*, 391 U. S., at 386; *Erie*, 529 U. S., at 292. The fact that the present statute has a greater impact on the expression of hate-spewing bigots than it does on believers in racial equality does not render it invalid if it otherwise qualifies as permissible regulation of a particularly harmful form of threat.

In *R. A. V.*, the purpose of discrimination on the basis of message was apparent on the face of the ordinance, and no amount of narrowing construction by the state court could save it. By its terms, "the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender.' " 505 U. S., at 391. In *Erie*, the state court found a dual purpose, and this Court held that the legitimate purpose was sufficient. See 529 U. S., at 291-298. In the present case, the Virginia Supreme Court focused only on what it perceived as "hostility" toward an "underlying message" of "expression of bigotry" in the burning cross, 262 Va., at 779, 553 S. E. 2d, at 746, ignoring the entirely legitimate reason for the prohibition. This raises the question of whether any implicit finding of legislative purpose in this discussion is binding on this Court, as a state high court interpretation of a state statute.

Wisconsin v. *Mitchell*, 508 U. S. 476 (1993) comes closest to the present case in this regard. The state high court's conclusion that the "hate crime" statute punished thought rather than conduct was not a binding construction of the statute. See *id.*, at 483-484. The state court's construction "in the sense of defining the meaning of a particular statutory word or phrase,"

id., at 484, is binding, but "this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law." *New York* v. *Ferber*, 458 U. S. 747, 767 (1982). A state court should not be able to insulate its decision from this Court's review simply by ignoring an obvious, legitimate purpose of a statute.

This statute prohibits conduct which the state has every right to prohibit. To the extent that it distinguishes a type of threat on the basis of content, it does so on the wholly legitimate basis of the exceptionally threatening effect of that content. The statute is valid as applied to the act of defendants Elliott and O'Mara. The only remaining question in their case is whether the statute is nonetheless invalid as "overbroad."

III. Narrowing construction and severability must be considered before determining if any overbreadth is substantial.

Defendant Black burned a cross at a Ku Klux Klan rally held on private property with the permission of the owner. The requisite intimidation was found from the reaction of a neighbor, who feared arson of her house and harm to her children. See *Black* v. *Commonwealth*, 262 Va. 764, 782, 553 S. E. 2d 738, 748-749 (2001) (Hassell, J., dissenting).

Unlike Elliott and O'Mara, Black has a plausible argument that his conduct falls in the zone of protected expression rather than unprotected threats. The California Court of Appeal distinguished the two types of cross burnings in *In re Steven S.*, 25 Cal. App. 4th 598, 606-607, 31 Cal. Rptr. 2d 644, 647 (1994) (emphasis in original, footnote omitted):

> "Cross burning conveys a message—the Ku Klux Klan's creed of racial hatred. As such, it implicates the First Amendment's guarantee of freedom of speech. [Citations.]
>
> "But an *unauthorized* cross burning *on another person's property*, which we shall call 'malicious' cross burning for

shorthand purposes, as distinguished from a ritual cross burning at a Klan gathering, does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm."

Amicus understands that the Commonwealth will argue that under the circumstances of this case, Black's cross burning comes within the definition of proscribable conduct. We will not repeat that argument here. Instead, we will address the question of whether, if *Steven S.* has drawn the constitutional line correctly, the Virginia statute must be stricken in its entirety as "overbroad."

A. Narrowing Construction.

The first and simplest way to deal with an overbreadth challenge to a statute is to construe the statute not to apply outside the constitutional boundaries. The dissent in the present case interpreted the statute to apply only to "real threats." See 262 Va., at 793, 553 S. E. 2d, at 754. So construed, there is no overbreadth question. Black's case would reduce to routine questions of correctness of jury instructions and sufficiency of the evidence. The case might also qualify for the more exacting review of facts on appeal sometimes afforded "in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 503 (1984); see *United States* v. *Hanna*, 293 F. 3d 1080, part III (CA9, June 20, 2002).

In the present case, the Virginia Supreme Court did not discuss in any detail the correspondence between the boundaries of the statute and the constitutional "threat" limit because of its mistaken view that the statute transgressed the rule of *R. A. V.* See part II, *supra*. This omission puts this Court in the awkward position of considering an overbreadth challenge without a definitive statutory interpretation from the state court.

Cf. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 509 (1985) (O'Connor, J., concurring).

If the *R. A. V.* question is resolved as suggested in part II, *supra*, there are several alternative ways for this Court to deal with the statutory interpretation question. The Court could remand for that determination, certify a question to the Virginia Supreme Court, or assume for the sake of argument that the statute does reach some protected expression and proceed to the question of partial versus full invalidation on that assumption. The latter course was taken in *Brockett*, 472 U. S., at 504.

B. Severability.

Assuming that the statute reaches cross burnings which are not targeted at anyone in particular, and further assuming that such applications of the statute cross the constitutional line, under the principles set forth in *Brockett*, "[f]acial invalidation of the statute [is] nonetheless improvident." *Id.*, at 501. Partial invalidation is not limited to excising particular words or phrases from statutory language. An overbroad statute may also be cured by identifying valid and invalid applications of its language, so long as that can be done in a way that cures the uncertainty of applications and resulting chilling effect on protected expression. In *United States* v. *Grace*, 461 U. S. 171, 175 (1983), a statute regulating speech on the Supreme Court "grounds" was invalidated only as applied to the perimeter sidewalks. See *Brockett*, *supra*, at 503. *Brockett* itself held that an obscenity statute could be valid as applied to some kinds of "lust" and invalid as to others. If "intimidating" under the Virginia statute really does extend further than constitutionally proscribable "threats," the statute is invalid to that extent, but only to that extent, and a simple holding to that effect by this Court or the Virginia Supreme Court is sufficient to cure any overbreadth. Following such a holding, there is no longer a "danger . . . of sweeping and improper application," *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), and the justification for applying the drastic overbreadth rule vanishes.

The Virginia Supreme Court focused its overbreadth analysis on the novel theory that threat of prosecution rather than actual application of the statute was a danger sufficient to warrant invalidation of the entire statute. See *Black*, 262 Va., at 777-778, 553 S. E. 2d, at 746; Pet. for Cert. 28-29. This holding is based on the final sentence of the statute: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Again, we leave to the Commonwealth the argument that this provision is constitutional. Assuming for the sake of argument that it does present a First Amendment problem, it was error as a matter of federal constitutional law to use this sentence to invalidate the entire statute without considering severability.

Severability is a matter of legislative intent. *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999). If the Virginia Supreme Court had actually considered severability and decided that the last sentence was not severable, that interpretation would be binding on this Court. The state court did not consider the question, though, and this appears to be a crystal clear case of severability. We need not speculate whether the legislature *would* have enacted the statute without the last sentence. Cf. *Brockett*, 472 U. S., at 506. We know it actually *did*. The language in question was added as the last amendment to the statute, in 1975. *Black*, 262 Va., at 776, 553 S. E. 2d, at 745.

New York v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982) noted in dictum that federal courts must consider severability and that state courts are "free" to do so. *Ferber* did not consider whether state courts must consider severability, as the issue was not presented. *Ferber* held that the "substantial overbreadth" principles of *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), apply to cases in the state courts as well as the federal courts.

> "While the construction that a state court gives a state statute is not a matter subject to our review, [citations], this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state-court decisions giving the Constitution too little shrift. A state court is not free to avoid a proper facial attack on federal constitutional grounds. [Citation.] By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution." *Ferber*, 458 U. S., at 767.

This rationale applies as much to the partial invalidation principle of *Brockett* as it does to the substantiality requirement of *Broadrick*, with one caveat. The principle requires the state court to consider severability, and its failure to do so is federal law error, reversible by this Court. A holding that the offending portion of a statute actually is not severable would be a holding of state law, not reviewable here.

CONCLUSION

To the extent it holds Virginia Code § 18.2-423 unconstitutional as content discrimination under the rule of *R. A. V.* v. *St. Paul*, the decision of the Supreme Court of Virginia should be reversed. The case should be remanded to determine whether the statute applies to any cross burnings which are not constitutionally proscribable threats, and if so, whether such applications are severable.

August, 2002

Respectfully submitted,

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Supreme Court U.S.
FILED
AUG 9 2001
OFFICE OF THE CLERK

No. 01-1107

In the

Supreme Court of the United States

Commonwealth of Virginia,

Petitioner,

v.

Barry Elton Black, Richard J. Elliott, and Jonathan O'Mara,

Respondents.

On Writ of Certiorari to the Supreme Court of Virginia

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STATEMENT OF AMICI INTEREST

Many State legislatures have been powerless to craft statutes that address the most virulent form of bias-motivated threats or incitements to violence after this Court rendered its decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Cross-burning is known by the actors, the victims, and the State governments to cause unique and significant harm. The States thus have a strong interest in this Court's consideration of the appropriate analysis under the First and Fourteenth Amendments of statutes that prohibit cross-burning with intent to intimidate. The constitutional analysis must be flexible enough to permit State legislatures to address pressing problems that have presented themselves without sweeping within the prohibition other problems of lesser importance.

SUMMARY OF ARGUMENT

The Virginia cross-burning statute, Code § 18.2-423, should be analyzed under traditional strict scrutiny principles, which would allow Virginia to justify its interest in restricting expressive activity and permit the Court to evaluate all the factors informing the State's decision, the nature of the expressive activity, and its unique harm for victims. Insofar as the Court's decision in *R.A.V. v. City of St. Paul* curtails a fully-informed review and forces States seeking to curb such harmful conduct to restrict more speech than may be necessary, the case should be revisited and its analysis rejected in favor of traditional strict scrutiny.

ARGUMENT

TRADITIONAL STRICT SCRUTINY REVIEW, WITH EVALUATION OF THE STATE JUSTIFICATION, THE HARM THE RESTRICTION CAUSES, AND THE NATURE, TYPE, AND CONTEXT OF THE SPEECH, IMPELS A FINDING OF CONSTITUTIONALITY.

In *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001), the Virginia Supreme Court, relying on this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), invalidated a Virginia statute prohibiting cross-burning as violative of the First Amendment. The Virginia Court found that while expressive activity that intimidates others may be restricted, its Legislature may not, consistent with the First Amendment as interpreted in *R.A.V.*, single out one intimidating message, such as cross-burning, for censure. 553 S.E.2d at 743-744.

There were three cases before the Virginia Supreme Court. In two companion cases, Richard J. Elliott and Jonathan O'Mara attempted to burn a cross in an African-American neighbor's yard. 553 S.E.2d at 740. In the third case, Barry Elton Black led a Ku Klux Klan rally at which a cross was burned. *Id.* at 741. All three individuals were prosecuted under Virginia Code § 18.2-423, which provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.
>
> [Va. Code § 18.2-423.]

The defendants were each convicted by a jury, but the convictions were overturned by the Virginia Supreme Court. The Commonwealth of Virginia petitioned for *certiorari*, which was granted. *Virginia v. Black*, __ U.S. __, 122 S.Ct. 2288 (Mem.) (2002).

The Virginia Court held that the analysis in this case mirrors that in *R.A.V. v. City of St. Paul*, *supra*, 505 U.S. 377. *R.A.V.* involved a Minnesota ordinance that prohibited placing a symbol like a burning cross or Nazi swastika on public or private property when the actor knows that it will arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender. *Id.* at 380. The Minnesota Supreme Court, in its review, limited the statute to apply only to conduct that could be considered "fighting words." *Id.* at 380-81.

The *R.A.V.* Court found this ordinance unconstitutional because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 381. Restriction of this speech is generally permitted; fighting words, like defamation and obscenity, are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). But a legislature may not engage in "content discrimination" by selecting one low-value message to censure: "The government may not regulate use [of fighting words] based on hostility -- or favoritism -- towards the underlying message expressed." *Id.* at 386.

The Court found the Minnesota ordinance to be content-discriminatory, in that intimidating expressive conduct is prohibited only when it is addressed to race, color, creed, religion, or gender. *Id.* at 391. The Court noted that the statute expressed hostility to these messages but not to similar intimidating messages on the basis of, for example, political affiliation, union membership, or sexual orientation. *Id.* at 391.

The Court further found the ordinance to discriminate on the basis of viewpoint, because it bars fighting words communicating racial hatred while permitting fighting words communicating racial tolerance. *Id.* at 391-92. Hence, the Court held that the statute unlawfully favors one side in a dispute.

The Court did, however, find that the ordinance furthered a compelling interest: "the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination . . . ." *Id.* at 395. But the Court found that the ordinance is not *necessary* to serve this compelling interest because a broader ordinance, not limited just to racist speech but to all fighting words and threats, "would have precisely the same beneficial effect." *Id.* at 395-96.

Strict scrutiny of a content-based regulation of speech requires that the restriction be necessary to serve a compelling state interest, and also be narrowly-tailored to achieve that end. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). The Court demands that government employ the least-restrictive alternative to serve the governmental purpose because "[t]o do otherwise would be to restrict speech without an adequate justification . . . ." *Id.* at 813.

By finding that the ordinance is not *necessary* to ensure basic human rights of members of historically-persecuted

groups because a broader ordinance would suffice, the *R.A.V.* Court altered the traditional strict scrutiny review of content-based statutes. "Tailoring" a statute narrowly to achieve its ends ordinarily requires selectivity, so that no more speech is prohibited than that which the government can adequately justify. A broader ordinance, in this context, limits more speech than necessary to achieve the City's goal and would, therefore, be unconstitutional. A ruling that only broader ordinances can be "necessary" dooms all selective restrictions.

The Court has upheld selective prohibitions within a category of speech. In *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103, *reh. den.* 496 U.S. 913 (1990), the Court upheld statutes that restricted only child pornography, a subcategory of sexually-explicit speech. The Court permitted this selection because of the State's interest in protecting children who are the subject of the speech. *Osborne*, *supra*, 495 U.S. at 110. A broader statute that did not single out child pornography would have had the same beneficial effect of protecting children. Child pornography is particularly harmful because it records a crime of sexual abuse, but it also could be addressed in broader, neutral, statutes prohibiting sexual abuse. *See also Watts v. United States*, 394 U.S. 705 (1969) (upholding statute that restricted threats against the President, a subset of threats against political officials).

If one type of speech causes greatest harm, the State should be permitted to craft a statute that addresses only that speech. As this Court has stated, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 191, 207 (1992). Just as child pornography can be selectively prohibited because of the unique harm it causes children, so, too, cross-burning may be selectively prohibited because of the unique harm it causes victims from certain groups.

Traditional strict scrutiny analysis permits a meaningful evaluation of the reasons government seeks to restrict speech. Of course, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy Entertainment Group*, *supra*, 529 U.S. at 818. But the government should be permitted to demonstrate that its effort to single out a narrower type of speech is justified. And those efforts should not be thwarted by a doctrine that the regulation is not "necessary" simply because it attempts to pinpoint one activity that causes greatest harm.

Statutes restricting speech must be carefully-crafted so that they do not restrict more speech than necessary to achieve their ends. This Court has frequently noted, for example, that the governmental interest in protecting children from pornography does not support a broad suppression of speech addressed to adults. *Playboy Entertainment Group*, *supra*, 529 U.S. at 814; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997). Similarly, the governmental interest in protecting the human rights of groups that have historically been subject to discrimination, abuse, and persecution may not support a broad suppression of speech directed to other groups.

Of course, a law infringing on speech or expressive activity is properly invalidated when the justification offered by government to support it is insufficient. Close examination of the justification will reveal whether the government interest is truly compelling and narrowly-tailored. Hence, in *Thompson v. Western States Medical Center*, __ U.S. __, 122 S.Ct. 1497 (2002), the Court found that the restrictions on advertisement and promotion of compounded drugs were more extensive than necessary to achieve the government's interests. *Id.* at __, 122 S.Ct. at 1505-06. The Court concluded: "The Government simply has not provided sufficient justification here." *Id.* at __, 122 S.Ct. at 1507. Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993), the Court found that a

prohibition on newsracks offering "commercial" publications but not newspapers did not adequately serve the City's asserted interest in safety and esthetics. The Court thus ruled that the restriction was not "necessary" to achieve the City's goal.

The government's justification for restricting speech is one part of a multi-factor balance. Balancing is implicit in the traditional strict scrutiny analysis. *See City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, __, 122 S.Ct. 1728, 1737 (2002) (the Court must balance competing interests); *Ferber*, *supra*, 458 U.S. at 764 ("the balance of competing interests is clearly struck"); *Spence v. Washington*, 418 U.S. 405, 417 (1974) ("even protected speech may be subject to reasonable limitation when important countervailing interests are involved") (Rehnquist, J., dissenting). Another factor is the nature of the speech.

Not all speech is entitled to the same level of protection. "Fighting words" and threats are accorded protection commensurate with their position in the First Amendment spectrum. *Chaplinsky v. New Hampshire*, *supra*, 315 U.S. at 572; *Watts v. United States*, *supra*, 394 U.S. 705 ("true threats" are unprotected). Society's interest in protecting non-obscene, sexually-explicit materials (portraying adults) is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," and so this speech has lesser value. *Young v. American Mini Theaters*, 427 U.S. 50, 70, *reh. den.* 429 U.S. 873 (1976). Commercial speech has "a measure of First Amendment protection 'commensurate' with its position in relation to other constitutionally guaranteed expression." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001).

The value of the speech affects the required weight of the justification for restricting it. The State may not regulate, on the basis of content, any speech, even speech of lesser value, without demonstrating a compelling interest in doing so. But

the governmental interest is most compelling when the State seeks to protect children from significant harm. *Ferber*, *supra*, 458 U.S. at 756-57. It is least compelling when the State merely seeks to protect citizens from discomfort. *Ashcroft v. The Free Speech Coalition*, __ U.S. __, 122 S.Ct. 1389, 1399 (2002).

Another factor in the balance is the type of speech at issue. As this Court acknowledged in *The Free Speech Coalition*, *supra*, __ U.S. at __, 122 S.Ct. at 1403, "First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct." "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989). The speech at issue here, cross-burning, is not speech but communicative conduct or expressive activity. It is a deed, not words; conduct, not ideas.

The context of the expressive activity should be considered. Cross-burning is not an invitation to discuss or debate ideas but, rather, it is extremely confrontational and potentially violent conduct. A burning cross is a symbol that, in the context of American history, carries a clear message of racial supremacy and hatred towards certain other groups. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770-71 (1995) (Thomas, J., concurring); M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich.L.Rev. 2320, 2365 (1989).

The harm intimidating expressive activity causes is an important factor to consider. Cross-burning inflicts unique and significant harm on members of certain groups that have historically been subject to discrimination. The deep physiological and emotional distress caused by such activity is well-documented. *See* Matsuda, *Public Response to Racist Speech*, *supra*, 87 Mich.L.Rev. at 2336-38.

Indeed, the unique harm caused by the activity insulates the restriction from viewpoint discrimination charges, since only the one viewpoint causes such harm. In contrast, the unlawful viewpoint discrimination of, for example, a school that permitted community groups to use the school after hours to teach morals and character development, but prohibited a religious group to teach that subject from the religious or Christian perspective, does not raise the same specter of harm. *See Good News Club v. Milford Central School*, 533 U.S. 98, 109-110 (2001). There was no showing that the teachings from either a secular or nonsecular angle presented any unique danger of harm. However, conduct that communicates racial hatred directed toward a member of a group that has historically been subject to prejudice and discrimination presents a significant danger of harm, while conduct communicating tolerance does not.

Scholars have argued that the failure of government to address racist propaganda "elevates liberty interests of racists over liberty interests of targets." *See* Matsuda, *Public Response to Racist Speech*, *supra*, 87 Mich.L.Rev. at 2378; 2375-81. Virginia seeks to condemn confrontational conduct expressing racial hatred by burning a cross in another's yard. Cross-burning cannot be considered outside of its historical context, a context of violence and, more important, implicit official sanction. Racial discrimination was, for too long, enforced by law. *See* A. Lewis, *Make No Law: The Sullivan Case and the First Amendment* 15-16 (1991). Efforts to alleviate the lingering effects should be viewed in a special light.

When it is clear to a legislature that bias-motivated threats that tend to intimidate and incite violence are predominantly addressed to certain groups, the legislature should be permitted to address the problem that confronts it. Recognizing that a special harm is caused by one viewpoint but not another, the legislature should be permitted to narrowly tailor its statute to restrict only speech that causes

that harm. Those legislative judgments should be accorded respect; cross-burning statutes may be "sustainable by deferring to the legislative judgment concerning which of several causes of a problem government elects to regulate." *State v. Vawter*, 642 A.2d 349, 367 (N.J. 1994) (Stein, J., concurring).

It is appropriate to apply traditional strict scrutiny here. Rather than strike down the statute because a broader statute would suffice, the Court should assess the nature and type of the regulated speech -- intimidation rather than political speech, expressive conduct rather than written or spoken words. It should evaluate the context of the speech, confrontational and potentially violent rather than a debate or discussion. Most importantly, it should consider the unique and significant harm the speech causes.

Accordingly, while Virginia's cross-burning statute is content-based, it may survive strict scrutiny review if Virginia is permitted to justify its statute and all relevant factors are duly considered. This Court quickly accepted the contention that the ordinance in *R.A.V.* served a compelling interest of helping to "ensure the basic human rights of members of groups that have historically been subjected to discrimination." *Id.* at 395. Virginia may be able to demonstrate that its statute furthers this compelling interest in a manner fully in accord with First Amendment principles.

In sum, the First Amendment requires due consideration of the factors relating to the right to speech or expressive conduct and the reason government seeks to restrict such expression. Some speech is central to the core purposes of the First Amendment, such as political debate, while other speech contributes very little to the exposition of ideas, like fighting words, sexually-explicit language, or threats. Expressive activity tends not to be an invitation to discussion and so should be recognized as less important, especially in a confrontational context. Some speech causes unique and

devastating harm, while other speech simply causes discomfort; the level or degree of harm should be considered when evaluating the justification for a restriction on expressive conduct. When all these factors are considered and balanced in the traditional strict scrutiny review, and Virginia's justification for the restriction is adequately demonstrated, the Court will find that this statute accords with the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Virginia Supreme Court should be reversed and Virginia Code § 18.2-423 should be upheld as fully in accord with First Amendment principles.

Respectfully submitted,

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Dated: August 9, 2002

Supreme Court U.S.
FILED
AUG 9 2002
OFFICE OF THE CLERK

No. 01-1107

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

BARRY ELTON BLACK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF AMICI CURIAE OF ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, HUMAN RIGHTS CAMPAIGN, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., AMERICAN JEWISH COMMITTEE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, COMMISSION OF SOCIAL ACTION OF REFORM JUDAISM, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, NATIONAL GAY AND LESBIAN TASK FORCE, NATIONAL COUNCIL OF JEWISH WOMEN, INC., AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION, IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*

Amici curiae listed in the caption hereof submit this brief in support of neither petitioner nor respondents.[1]

Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The impetus for ADL's founding was a hate crime—the lynching of a Jewish man, Leo Frank, in Atlanta, after his unjust conviction for murder and the commutation of his death sentence to life imprisonment—and ADL's core commitment is to the eradication of hate. Yet, as a civil rights advocacy organization, ADL is equally committed to the preservation of our democratic freedoms and to the constitutional rights that gird those freedoms. ADL is particularly sensitive to First Amendment rights of speech, belief, and conscience, believing that such

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amici* have obtained and lodge herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici* and their counsel, made a monetary contribution to its preparation or submission.

freedoms are essential to our other freedoms as Americans, and that they serve as foundation stones of the fight against hate and bigotry. The competing interests at stake here are thus of keen interest to ADL and central to its mission.[2]

People for the American Way Foundation

People For the American Way Foundation ("People For") is a non partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 500,000 members and supporters nationwide. People For has a broad concern for protecting First Amendment rights, and has submitted *amicus* briefs to this Court in support of free expression in a number of recent cases, such as *Ashcroft v. A.C.L.U.*, 122 S. Ct. 1700 (2002), and *United States v. Eichman*, 496 U.S. 310 (1990). At the same time, People For is devoted to promoting religious and racial tolerance and to combating discrimination and prejudice, a goal which can be accomplished consistent with the First Amendment. People For accordingly believes that it is important

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[2] ADL has participated in other relevant cases to reach the Court. *See* ADL briefs *amicus curiae* filed in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

that the Court's decision in this case makes clear, consistent with the First Amendment, that a state may proscribe conduct such as cross-burning when it is intended and likely to instill fear and terror in others.

Human Rights Campaign

Human Rights Campaign ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 450,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory, and judicial advocacy, as well as media and grass roots support on a range of initiatives affecting gay, lesbian, and bisexual individuals who suffer discrimination or hate crimes because of their sexual orientation. HRC has a clear interest in the prevention and punishment of the criminal conduct at issue in this case.

National Asian Pacific American Legal Consortium

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal and public policy advocacy, as well as community education, on

discrimination issues affecting the communities they serve. NAPALC is a leading national voice against anti-Asian violence, and accordingly has a vital interest in the issues presented in this case.

The National Conference for Community and Justice

The National Conference for Community and Justice ("NCCJ"), founded in 1927 as The National Conference of Christians and Jews, is a human relations organization dedicated to fighting bias, bigotry, and racism in America. NCCJ promotes understanding and respect among all races, religions, and cultures through advocacy, conflict resolution, and education. Uniquely positioned to enhance community leadership development programs in its service area with 61 offices in 34 states and the District of Columbia, NCCJ has dedicated itself to empowering leaders to create institutional change directed to the transformation of communities so that they may provide fuller opportunity to their citizens and so that they are more inclusive and more just. NCCJ is vitally interested in this case because of its central mission of fighting bigotry and racism in America, and because of the significant ramifications that this case will have in our communities.

Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans

nationwide through the prosecution of lawsuits, through its legal advocacy, and through the public dissemination, both in the communities it serves and more broadly, of information respecting discrimination against Asian Americans. AALDEF has throughout its history been in the forefront of the campaign to end violence against racial, national origin, and religious groups. Along with its affiliates, AALDEF annually publishes an audit of racial violence against Asian Americans. Criminal laws that punish intentional intimidation and serious threats are an important weapon in the arsenal of a state's responses to racial violence, and AALDEF is accordingly interested in the issues in this case.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc. ("Hadassah"), founded in 1912, is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and of the Jewish community in the United States. Crimes involving symbols of hatred such as burning crosses are an extreme manifestation of bigotry, and historically Jews and women alike have been targets of such crimes. Such crimes threaten the viability of our communities. While Hadassah is strongly committed to the First Amendment's guarantee of freedom of expression, Hadassah equally supports laws that combat crimes of intimidation.

American Jewish Committee

The American Jewish Committee ("AJC"), a national human relations organization with over 115,000 members and supporters and 33 regional chapters nationwide, was founded in 1906 to protect the civil and religious rights of Jews. AJC has historically been a staunch defender of the First Amendment's guarantees of freedom of expression. At the same time, AJC has been sensitive to the constitutional limits of free speech and firmly believes that purposeful intimidation and intentional threats of violence have no place in our society.

Jewish Council for Public Affairs

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 13 national and 122 local Jewish community relations organizations. JCPA was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just American society. JCPA holds that crimes based on hatred and intimidation are anathema to the fundamental democratic values upon which this nation is founded.

Commission of Social Action of Reform Judaism

The Commission of Social Action of Reform Judaism ("CSA") is a joint instrumentality of the Union of American Hebrew Congregations ("UAHC") and the Central Conference of American Rabbis ("CCAR"). The 900 congregations of UAHC encompass 1.5 million Reform Jews; the membership of CCAR 1,800 Reform rabbis. CSA establishes policy for the Religious Action

Center of Reform Judaism, established to advocate for social and political policy in keeping with Jewish law and theology as understood by Reform Judaism.

Crimes such as those involved here hit particularly close to home for the Jewish people. All of us have watched in horror as acts of violence against Jews and Jewish institutions have, over the past year, again terrorized Europe and nations across the globe, creating an atmosphere of fear and intimidation. Laws which proscribe such crimes underscore, indeed strengthen, our nation's historic promise of liberty and justice. Jewish ethics support the struggle to uphold such laws. Jews are taught that God created humans *b'tselem elohim*, in the Divine Image, and that we are all, therefore, deserving of equal treatment (Genesis 1:27). Jews are commanded that "You may not stand idly by when your neighbor's blood is being shed" (Leviticus 19:16) and that "You shall not hate your kinsfolk in your heart. . . . Love your fellow as yourself" (Leviticus 19:17-18). Because of these precepts, Judaism teaches the importance of tolerance and acceptance of others. And because of the importance of these precepts CSA has a keen interest in this case.

American-Arab Anti-Discrimination Committee

The American-Arab Anti-Discrimination Committee ("ADC") is the national association of Arab Americans that works in every sphere of public life to promote and defend the interests of the Arab-American community. ADC is a grassroots civil rights organization welcoming people of all backgrounds,

faiths, and ethnicity as members. Since its founding in 1980 by former U. S. Senator James Abourezk, it has grown into the largest non-sectarian, non-partisan civil rights organization in America dedicated to protecting the civil rights of Americans of Arab descent. ADC works with other civil rights organizations and coalitions on a multitude of issues that affect constitutional freedoms. With headquarters in Washington, D.C., ADC also has more than 80 membership chapters nationwide. Through its Legal Department, ADC offers counseling, advocacy, and mediation, addressing hate crimes, employment and educational discrimination, public accommodation discrimination, immigration, housing, freedom of speech, and other civil liberties.

ADC is committed to combating crimes of hate while at the same time protecting the constitutional guarantees of expression. As the national voice of the Arab-American community, ADC supports and joins the Anti-Defamation League and other *amici* in submitting this brief, in the belief that freedom of speech and expression are equally as important to the American way of life as freedom from hate, and from racial, ethnic, and religious bigotry in our society.

National Gay and Lesbian Task Force

Founded in 1973, the National Gay and Lesbian Task Force ("NGLTF") works to eliminate prejudice, violence, and injustice against gay, lesbian, bisexual, and transgender people at the local, state, and national level. As part of a broader social justice movement for justice and equality, NGLTF strives to

create a world that respects and celebrates the diversity of human expression and identity, where all may fully participate in society. In its mission, NGLTF works to curtail hate crimes in this country, but simultaneously respects the key right of free speech.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families, and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members, supporters, and volunteers in over 500 communities nationwide. NCJW joins this brief in light of its National Principle, which states that "Human rights and dignity are fundamental and must be guaranteed to all individuals," and its National Resolution supporting "The enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all."

Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association

The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Committee") is a non-profit law office that provides free legal services to victims of discrimination based on race or national origin. We have been successful in some of Massachusetts' most important civil rights cases, including school desegregation, housing

discrimination, and voting rights cases. In 1982, the Lawyers' Committee created the Project to Combat Racial Violence to address the crisis of racial violence that was engulfing Boston and surrounding communities. Twenty years later, we continue to represent victims of racially motivated harassment, violence, and intimidation throughout the Boston area, and have participated as *amicus curiae* in numerous cases involving the interpretation of our state hate crimes law. The Lawyers' Committee has an interest in this matter because all victims of racial violence and harassment deserve aggressive enforcement of their state's laws proscribing intimidation. Massachusetts does not have a specific cross burning statute, perhaps because the history of racism in New England has manifested itself differently than that of other states. But we support the vigorous enforcement of such laws in other states, and believe that statutes like Virginia's are consistent with the First Amendment.

* * *

All of the *amici* are uniquely situated to suggest, if not a resolution of the competing interests presented by this case, at least a mode of analysis through which an answer to such questions may ultimately be reached. As civil rights organizations, they each have widely varying missions. Yet all nonetheless recognize the paramount importance of protecting First Amendment privileges, even if the exercise of such privileges results in the expression of hateful ideas. But *amici* also recognize that expressive conduct can constitute a crime when a symbol of hatred such as

the burning cross is used to target others with the intent and likely effect of instilling in them fear and terror.

Amici believe that such crimes of intimidation continue to be a serious problem in our country, that legislatures should have the flexibility to punish expressive conduct which has such an intimidating intent and likely effect, and that in doing so they do not transgress First Amendment limitations. *Amici* thus submit this brief, in support of neither petitioner nor respondents, to advance their conviction that expressive conduct may be proscribed and punished if by its nature as "fighting words" it is outside the realm of protected speech, and if the criminal proscription requires a *mens rea* element of a specific intent to intimidate or to threaten. A statute that meets these requirements passes constitutional muster.

STATEMENT

Virginia Code § 18.2-423 provides, in pertinent part, that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.

The statute also contains a presumption that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate . . . ." Respondents were

convicted of violating § 18.2-423. Respondent Black burned a cross at a rally of the Ku Klux Klan conducted on private property but within view of the property of others. A jury found him guilty, believing that the evidence was sufficient to support the requirement of the statute that he intended to intimidate. Respondents O'Mara and Elliott burned a cross on the property of a neighbor, an African-American, in the night in retaliation for the neighbor's complaints about Elliott's "shooting guns in the backyard." O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, reserving his constitutional challenge, and his guilty plea constitutes an admission that he intended to intimidate others. A jury found Elliott guilty of attempted cross burning. As with Black, the jury found that the evidence supported the requirement that Elliott intended to intimidate his neighbor by burning a cross.

SUMMARY OF ARGUMENT

1. Government may constitutionally proscribe intimidation and threats, even if accomplished by speech or expressive conduct. The essential First Amendment safeguard for such regulation is found in the *mens rea* requirement of intent to bring about the desired end of instilling fear or terror in targeted individuals. In focusing on this element, the Virginia statute is consistent with the First Amendment.

2. The Virginia statute is neutral in viewpoint. It seeks to accomplish the legitimate state goal of proscription of intimidation without discrimination, by

banning *all* cross-burning, so long as accompanied by the required specific intent. It does not ban only those acts motivated by or which seek to express a particular viewpoint.

3. That the Virginia statute singles out the burning of *crosses* for particular proscription does not invalidate it. It is not generally necessary to prohibit either all acts of intimidation or none in order to guard against government infringement on rights of conscience, speech, and belief. Rather, it is sufficient if a state legislature has made a reasoned judgment that within the universe of threats, some are worse than others.

4. The message of intimidating cross burning is within the class of expressive conduct of such slight social value as to permit of outright ban. This doctrine of "fighting words" outside First Amendment reach appropriately encompasses words that are intended to and have the likely effect of creating fear of injury in the addressee. The burning of a cross with the requisite intent may be banned under this principle.

5. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), does not contradict this conclusion. While that case dealt with cross burning, it did not address a statute that conditions proscription on the actor's intent to intimidate others. Moreover, under the rule enunciated in that case, Virginia had the power to regulate speech involving intimidating cross burning because it had the power to regulate the broader class of intimidating or threatening speech intended to induce serious fear in others.

ARGUMENT

ASSAULTIVE AND UNPROTECTED SPEECH MAY BE CONSTITUTIONALLY PROHIBITED AND PUNISHED UNDER STATUTES SUCH AS THE VIRGINIA STATUTE

The Virginia Supreme Court invalidated Virginia Code § 18.2-423, asserting that "the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content . . . ." *Black v. Commonwealth*, 267 Va. 764, 768 (2001). The majority of that court felt that "[t]he Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V. (v. City of St. Paul)*." *Id.* at 772. In so holding, the Virginia court ignored the assaultive nature of the expressive conduct at issue and its consequent lack of constitutional protection.

A. The Statute Punishes Assaultive Speech Designed to Induce Fear in Others, Not Any Particular Viewpoint or Message.

It is axiomatic that a state legislature, in the exercise of the state's police power, may proscribe conduct harmful to others. It is equally axiomatic that such proscribable conduct includes intimidation. Thus, expressive conduct or speech both intended and likely to induce serious fear in others has long been held subject to criminal proscription. The Virginia legislature, as have the legislatures of other states with historical legacies of racism, bigotry, and hatred, chose

to punish a particular form of assaultive speech or intimidating conduct—the burning of a cross. It did so, however, without reference to the *content* of that expressive conduct, defining the crime instead by the intent with which it is committed and only by that intent. Cross burning *per se* is not prohibited by the statute. What is prohibited is cross burning "with the intent of intimidating any person . . . ."

Under the scheme of § 18.2-423, it does not matter what substantive message a defendant intended to convey by burning a cross. While choosing a symbol that Americans uniformly view as emblematic of racial and religious hatred, the legislature did *not* choose to punish the mere expression of hatred. It rather chose to punish expression only when it crosses the constitutional line into assaultive speech and is accompanied by the intent to instill serious fear in those exposed to the message.

Section 18.2-423 is accordingly limited. As noted by the dissent below, "by its express terms, [it] does not proscribe every act of burning a cross." *Black v. Commonwealth*, 262 Va. at 787. Rather, it punishes such conduct only when performed with the requisite *mens rea*—a specific intent to intimidate. As defined by the courts of Virginia, "intimidation" refers to "acts which put the victim 'in fear of bodily harm.'" *Id.* Mere offensiveness based on the listener's personal characteristics is insufficient to constitute criminal intimidation. It is defined not by reference to the peculiar susceptibilities of the victim, but by the intent of the actor. "Such fear must arise from the willful

conduct of the accused, rather than from some mere temperamental timidity of the victim. . . ." *Id.* Because it focuses on the actor's intent, and not the addressee's perception, the danger of regulation of otherwise protected viewpoint is virtually non-existent.

Finally, that the Virginia statute punishes harmful conduct and not viewpoint is illustrated by the fact that guilt under the statute is not dependent upon a motivation of racial or religious hatred. It is equally triggered by mere personal animus or other such content. For example, the evidence as to whether O'Mara and Elliott harbored racial hatred was ambiguous. But there was evidence to establish that, whatever their reasons, these respondents intended to instill fear in their targets. In punishing that expressive conduct, the Virginia statute does not violate First Amendment protections.

B. The Virginia Statute is Not Invalid In Proscribing a Particular Form of Assaultive Speech.

While a statute punishing intimidation or threats is constitutionally permissible, it may be argued that the Virginia statute impermissibly focuses upon certain racial or religious categories of intimidation. Because it proscribes *all* threatening uses of a burning cross, § 18.2-423 does no such thing. But even if the statute were understood as applying to particular forms of intimidation, this argument would be flawed. Content neutrality places restrictions upon the state's ability to proscribe intimidation—for example, a state could not criminalize only acts of intimidation that are aimed at

members of a particular political party. To accept content neutrality, however, does not require an all-or-nothing-at-all approach—it is not necessary to prohibit either all acts of intimidation or none. Were that the case, many criminal laws that are unquestionably lawful would raise issues of content neutrality.

A state may properly make a judgment that, within the universe of threats, some are worse than others. For instance, an assault with a deadly weapon is, in most states, some form of aggravated assault. The crime is more serious because the defendant has exposed society to greater risk—even if the weapon is not actually used—and has presumably caused greater fear in the victim. These differences justify an increased penalty. Likewise, a state may determine that acts of bias-motivated intimidation are worse than otherwise comparable acts, because these crimes cause greater societal harm and injury to the victims. That the Virginia legislature chose to proscribe conduct that has a high propensity to intimidate and, in its judgment, that causes greater harm to society, is simply not constitutionally significant.

Similarly, it may be argued that the Virginia legislature chose to proscribe a symbol, and that it therefore intended to suppress a message identified with that symbol. This argument proves too much. While it is "a bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Virginia legislature has not forbidden its citizens to burn

crosses in order to express racial or religious hatred. This they remain free to do. What they may not do is burn crosses with the intent of instilling serious fear, for this invades others' rights. *See* D., *infra* at 24.

Equally, that the burning of a cross has a direct tendency to instill serious fear does not invalidate the prohibition as content-based. The origin of the symbol underscores the power of its message. "The Klan . . . appropriated one of the most sacred of symbols as a symbol of hate." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 771 (1995) (Thomas, J., concurring). But the burning cross not only is linked to racial and religious hatred, but is directly associated with violence, terror, and lawlessness.[3] The

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[3] A late-night cross burning in the yard of a neighbor, with the intent to intimidate, the crime of which respondents O'Mara and Elliott were convicted, is an act of violence and terror.

> After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person."

United States v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991).

use of this symbol, charged as it is with historical associations of violence, accompanied by a specific intent to intimidate, inflicts injury through speech. Cross burning, of course, has been specifically recognized as having such an effect. It is "not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence . . . ." *United States v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991).

The state may not proscribe the *expression* of hate, whether racial, religious, anti-Semitic, or ethnic. But the state may prohibit the use of a particular symbol, one universally identified with violent manifestations of hate, when it is employed to intimidate. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (citation omitted) ("First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control."). The latter objective is all the Virginia statute seeks to accomplish, and it does not invade the precincts of the First Amendment in doing so.[4]

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[4] The Virginia statute states that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate . . . ." To the extent that this presumption eliminates *proof* of the state of mind of a defendant, in *amici's* view the statute may run afoul of First Amendment protections which, under our formulation, require such proof.

C. Cross Burning With the Intent to Intimidate a Targeted Individual is Expressive Conduct Outside the Scope of First Amendment Protection.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that "certain well-defined and narrowly limited classes of speech, . . . including the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" are not within the scope of protection of the First Amendment. *Id.* at 571-72. As recognized by the Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), "our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 382-83, quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572. For the reasons we have discussed, the proscription here is within the classical definition of "fighting words," and as such outside the scope of protection of the First Amendment.

This doctrine retains substantial force in the context of assaultive hate speech. While *Cohen v. California*, 403 U.S. 15 (1971), and *Lewis v. New Orleans*, 415 U.S. 130 (1974), refined the doctrine, in one case requiring that the state must show that the defendant directed "personally abusive epithets" at a specific individual (*Cohen v. California*, 403 U.S. at 20), and in the other requiring that the words be directed at a person with a predisposition to fight (*Lewis v. New Orleans*, 415 U.S. at 135 (Powell, J., concurring)), the gravamen of the doctrine remains

that words which inflict serious and real injury are both proscribable and punishable. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection").

Viewed as the underpinning to punish expressive conduct specifically intended and likely to intimidate—in this case, cross burning—the doctrine retains special force. As one leading commentator has put it, "[i]f *Chaplinsky* is to maintain any contemporary vitality, it must be understood to place outside the First Amendment's reach those words that are intended to and have the likely effect of creating fear of injury in the addressee." Frederick M. Lawrence, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 102 (1999).[5] Statutes like the Virginia statute do precisely that. In proscribing such "fighting words," these statutes properly regulate an area of expressive conduct that is not protected by the First Amendment.

D. The Court's Holding in *R.A.V.* Does Not Control This Case.

The Court's holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which the Supreme Court of Virginia believed controlling, does not invalidate

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[5] Professor Lawrence is co-counsel to *amici* in this case, and a co-author of this brief.

statutes like the Virginia statute. What distinguishes such statutes, and the Virginia statute as well, from the statute invalidated in *R.A.V.*—and what takes the respondents' conduct here outside the realm of protected speech—is the incorporation of the required *mens rea* element of a specific "intent to intimidate."

In *R.A.V.*, St. Paul chose to punish cross burning by reference to an effect on third parties related to the *content* of the speech. While the statute was construed by the Supreme Court of Minnesota to proscribe only "fighting words" otherwise outside First Amendment protections, it nonetheless swept within its prohibition only those "fighting words" that "insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" *R.A.V.*, 505 U.S. at 391. In doing so, it selected among different forms of speech, and thus regulated the content or viewpoint of that speech. "Fighting words" or not, this regulation or proscription transgressed the First Amendment line.

But here, the statute does not select among messages or content or viewpoint. Instead, it identifies a particular type of conduct—the burning of a cross—accompanied by a particular kind of *mens rea*—intent to intimidate—and makes it illegal consistent with the First Amendment. The Virginia statute does not select among ideas, choosing to prohibit only particular political or religious (or even hateful) messages. To the contrary, the actor may utter whatever message he wishes, hateful, distasteful, even violent. But when the actor acts—by using fighting words—with the required *mens rea*, with an intent to intimidate, he

passes outside the sphere of protected expression into the sphere of proscribable activity.[6]

In locating its proscription in the actor's intent, the Virginia statute properly focuses on the right of others to be free of assaultive conduct, and proscribes expressive conduct without regard to content or expression. Unlike *R.A.V.*, this is true regardless of the actor's motive, and punishes the conduct whether the motive is based on race, religion, or mere personal animosity. This type of prohibition, focusing as it does on intent and conduct of the actor, and not on content, passes First Amendment muster even under the rigorous test established by *R.A.V.*.

That the speech here is proscribable when accompanied by specific criminal intent to intimidate is clear also from another aspect of *R.A.V.* As Justice Scalia pointed out there, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint

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[6] The *R.A.V.* statute also did not require intentional conduct. Rather, the ordinance challenged there could be violated by negligent conduct if a defendant used a symbol "which one knows or has reasonable ground to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ." *Id.* at 380. A statute which can be violated by negligent conduct poses a more distinct threat to First Amendment freedoms than one requiring the state to prove intentional conduct, such as that here.

discrimination exists." *R.A.V. v. City of St. Paul*, 505 U.S. at 388. The Virginia legislature chose to proscribe the burning of a cross with the intent to intimidate because of the clear harm criminal intimidation poses to targeted individuals. In such a case, the "reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.* Thus, Virginia could constitutionally choose to exclude this one type of expressive conduct—the burning of a cross with the specific intent to intimidate—because it can constitutionally prohibit speech that is intended and likely to intimidate and threaten.

Amici emphatically support laws that proscribe criminal conduct such as that at issue here. Yet *amici* also stand firmly behind the commitment to free expression. They would not and do not urge that belief, conscience, or hateful speech alone may be suppressed. The "bedrock principle" (*Texas v. Johnson*, 491 U.S. 397 at 414) that upholds expression even of distasteful ideas leaves no room for government regulation. But expression for the purpose of intimidation, expressive conduct directed at an individual to instill or inspire fear, is simply not within the expansive realm of freedom of speech as we know it. Society may properly guard against this evil.

As a corollary, of course, the burning of a cross without the accompanying *mens rea* requirement of an intent to intimidate would constitute protected speech. Thus, *amici* concede that the burning of a cross at a

political rally as a general expression of racial or religious hatred is protected expressive conduct.[7] No matter how odious or unpalatable the idea, *amici* recognize the First Amendment protection accorded such expression. While perhaps offensive to others, it is nonetheless protected; that is the price we pay for the First Amendment, and it is not too high a price.

An act intended to intimidate others is different in kind, and forfeits expressive protection, from an act intended to make a political, or racial, or religious, point, even such a point infused or motivated by hate or bias. We tolerate the *expression* of hatred because the First Amendment guarantees freedom of all expression, but we distinguish from true expression words and expressive conduct that are intended and likely to intimidate. In those cases, we may constitutionally proscribe the use of symbols when they are the means through which the vital force of that intimidation is conveyed.

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[7] *Amici* take no position on whether the juries in these cases properly found an "intent to intimidate" or whether the evidence in this regard was sufficient to sustain the convictions of Elliott and Black, the two respondents convicted at trial. The two cases raise different problems of proof, and in one the proof may well have been sufficient, while in the other it may not have been. In particular, proscribing the burning of a cross at a rally, without a specific target of intimidation or threat, may not satisfy constitutional requirements.

* * *

The intimidation of others is a serious crime. It is no less a crime, and no less punishable, when accomplished through the burning of a cross. While that act may have expressive content, a state may validly proscribe it when it does not single out any particular viewpoint, but rather focuses only on the act and the requisite specific intent of the actor.

Amici, leading American civil rights groups each concerned in its own way with, and dedicated in its own mission to, the eradication of hate, bigotry, and bias-related violence, are mindful that we must tread with great caution in regulating speech, conscience, or belief. But there is no social value in the burning of a cross accompanied by the specific intent to intimidate others. It does no violence to the First Amendment to bar such conduct.

CONCLUSION

The judgment of the Supreme Court of Virginia invalidating Virginia Code § 18.2-423 on the First Amendment grounds specified in that court's opinion should be vacated.

Respectfully submitted,

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August 2002

Supreme Court U.S.
FILED
AUG 9 2001
OFFICE OF THE CLERK

No. 01-1107

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

Like Virginia, California has enacted a cross-burning statute, proscribing what California considers to be a form of "terrorism."[1] And, like Virginia, California seeks to ensure that its statute be found by this Court to be permissible – without offense to the First Amendment. California also concurs with Virginia that, insofar as these statutes proscribe only conduct that is threatening, the statutes should be deemed to be content-neutral, rather than content-based. They should, therefore, be found to lie outside the concern expressed in this Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992).

But California's statute, by its terms, is narrower than is Virginia's statute. California's statute prohibits only *trespassory* cross-burning for an intimidating purpose, *i.e.*, on the property of another, without the authorization of

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[1] California's "cross-burning" statute is expressly treated as a form of *terrorism*:

> Any person who burns or desecrates a cross or other religious symbol . . . on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that property, or who burns, desecrates, or destroys a cross or other religious symbol . . . on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends or works at the school or who is otherwise associated with the school, shall be punished . . . .

Cal. Pen. Code § 11411(c). "Terrorizing" is defined as "caus[ing] a person of ordinary emotions and sensibilities to fear for personal safety." § 11411(d).

the occupant, and for the purpose of intimidating that occupant. Cal. Pen. Code § 11411(c). California therefore submits this brief to ensure that, in analyzing the issue presented, the Court is aware of the different approaches that the States take in the treatment of this evil.

SUMMARY OF ARGUMENT

California joins Virginia in urging that this Court recognize the special injury that is inflicted by cross-burning. Like an anonymous threatening phone call at 2:00 a.m., the unwelcome burning of a cross, or any religious symbol on the property of another, carries with it a particular credibility and fearsomeness as a threat of violence. Furthermore, trespassory cross-burning, as prohibited by California and other states,[2] is both anonymous and particularly brazen, revealing that the perpetrator respects no boundaries. Cross-burning is inherently dangerous. It manifests a willingness to risk the spread of fire from the cross to other property – a yard, a residence – in order to bring home the intensity of its threatening message.

Cross-burnings strike fear, not only in their particular victims, but in the surrounding neighborhoods. Cross-burnings breed distrust and can thereby break down the delicate social fabric of a community – particularly the

[2] An element of the California statute is that the cross-burning must be "without authorization," Cal. Pen. Code § 11411(c), which has been construed to mean the authorization of the victim-occupant. *People v. Carr*, 81 Cal.App.4th 837, 842-43, 97 Cal.Rptr.2d 143 (2000).

important and delicate balance of trust in communities of diverse racial, ethnic, and religious makeup. Cross-burnings cannot realistically be addressed as ordinary malicious mischief; in recognition of the especially insidious nature of cross-burnings, that conduct must be addressed specially. California and other states have chosen to do so.

California, like Virginia, proscribes a mode of communication, in this case, the making of a threat of personal injury by means of burning a cross or other religious symbol. The intended message of the perpetrator is utterly immaterial. What matters is only that the conduct was accomplished for the purpose of intimidation or, in California, terrorizing. Accordingly, as a content-neutral regulation of clearly proscribable expression, the Virginia statute does not implicate the "strict scrutiny" analysis articulated by this Court in *R.A.V.*

But even if the Virginia statute were deemed to be "content-based," it would be permissible under *R.A.V.*, because violation of the statute requires proof of intent to intimidate. Therefore, "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Furthermore, the statute falls within two permissible bases recognized by this Court for regulation of proscribable speech: First, only that cross-burning is proscribed that engenders fear of personal injury, and that is the very reason why threatening speech is proscribable at all. See *id.* at 388. Second, proscription of cross-burning is justified by Virginia, as by California, because of the "secondary

effect" of intimidation – without regard to the particular content of the intended message. *Id.* at 389.[3]

ARGUMENT

A. VIRGINIA'S CROSS-BURNING STATUTE IS CONSTITUTIONAL AS A CONTENT-NEUTRAL REGULATION OF PROSCRIBABLE CONDUCT

1. Cross-burning statutes like California's and Virginia's are focused, not on any particular message intended by the perpetrator, but on the particularly pernicious mode in which that message – whatever it is – is communicated, *viz.*, "in a threatening (as opposed to a merely obnoxious) manner," see *R.A.V.*, 505 U.S. at 393, by means of burning a religious symbol. *Threatening* expressive conduct, like "fighting words," is analogous to a noisy sound truck. "Each is . . . a 'mode of speech' . . . ; both can

[3] Some courts speak of three exceptions articulated in *R.A.V* to the general prohibition against content-based discrimination within proscribable speech. See, e.g., *In re Steven S.*, 25 Cal.App.4th 598, 31 Cal.Rptr.2d 644 (1994). Amicus, however, reads *R.A.V.* as articulating a general justification for content-based discrimination within a class of proscribable speech – "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot," *R.A.V.*, 505 U.S. at 390 – and providing two examples of such a justification, *viz.*, that "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable," *id.* at 388, and that the content-based subclass of proscribable speech is "associated with particular 'secondary effects' of the speech, so that the regulation is *'justified* without reference to the content of the . . . speech.'" *Id.* at 389 (alteration in original) (citations omitted).

be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment." *R.A.V.*, 505 U.S. at 386 (citation omitted).

The deliberate burning of religious symbols on the property of another communicates a simple message – a threat to personal safety. To be sure, a more specific message might be *inferred*, on a case-by-case basis, from the characteristic or trait of the victim of the intimidation, but the statute draws no such distinctions. The proscription at issue here applies to malicious and trespassory burning of a religious symbol, whatever may be the intended message: whether it is a threat based on the race of the victims; the religious beliefs of the victims (e.g., Muslim); the nationality of the victims (e.g., Palestinian); the sexual orientation of the victims; the profession of the victim (e.g., a doctor who performs abortions); or, indeed, any other basis for which, under the circumstances, a burning religious symbol might reasonably be understood by the victim as a threat to personal safety. Under statutes like Virginia's and California's, it matters only that the perpetrator burns the cross (or other religious symbol) for the purpose of intimidating those persons who are the objects of the message. Furthermore, the burning of a religious symbol for *any* purpose *other* than intimidation is not proscribed by either statute.

2. Cross-burning statutes like Virginia's and California's, therefore, should be treated as content-neutral and exempt from the strict-scrutiny analysis articulated in *R.A.V.* Indeed, the Court in *R.A.V.* expressly acknowledged that "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable

(and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 393. The Court noted that, "St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance." *Id.* at 393-94.

Unlike St. Paul, California and Virginia have singled out "an especially offensive mode of expression," *viz.*, *terrorizing* or *intimidation* by use of a burning of a religious symbol, without regard to the intended message of the perpetrator. This Court has previously recognized that a true threat to personal safety enjoys no constitutional protection. *Watts v. United States*, 394 U.S. 705 (1969); see also, *R.A.V.*, 505 U.S. at 388 ("[T]he reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President."). The proscription against cross-burning in the California and Virginia statutes is "on the basis of a noncontent element," *id.* at 386, *viz.*, *intimidation* and, in California, *trespassory terrorizing*. As a facially content-neutral regulation of conduct, the statutes are not subject to the strict scrutiny mandated by the Court in *R.A.V.*

B. EVEN IF VIRGINIA'S CROSS-BURNING STATUTE WERE DEEMED TO BE CONTENT-BASED, IT WOULD BE PERMISSIBLE BECAUSE THERE IS NO REALISTIC POSSIBILITY THAT OFFICIAL SUPPRESSION OF IDEAS IS AFOOT

1. The Virginia Supreme Court incorrectly treated Virginia's cross-burning statute as content-based because of the original motivation behind enactment of the statute. *Black v. Commonwealth*, 262 Va. 764, 774, 553 S.E.2d 738 (2001) ("While not specifically stating that 'race, color, creed, religion, or gender' is the subject of proscription, the absence of such language does not mask the motivating purpose behind the statutory prohibition of cross burning."). But nothing in *R.A.V.* suggests that courts should look behind the facial neutrality of a cross-burning statute. In this regard, the state court's reliance on *United States v. Eichman*, 496 U.S. 310 (1990), see *Black v. Commonwealth*, 262 Va. at 775, is inapposite. In *Eichman*, the Court looked behind the facial neutrality of the statute in order to safeguard the expression of *permissible* expressive conduct, *viz.*, expressive burning of the flag. In this case, however, true threats of personal injury – no matter how delivered – should never enjoy constitutional protection. *Watts v. United States*, 394 U.S. 705; cf., *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."). Since the cross-burning statute facially proscribes a class of threats based only on the *mode* of delivery, and not on its content, no legitimate free-speech interest is served by considering

whether the legislature might originally have passed the statute to address a then-common pattern of threats based on race.[4]

2. Even if the statutes were deemed to be content-based, they clearly come within the permissible justifications recognized by this Court for content-based regulation of otherwise proscribable speech. Although the Court discussed three possible justifications for such regulation, the Court acknowledged that others were possible. "Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Amicus respectfully submits that, inasmuch as both the California and the Virginia statutes, by their very terms, proscribe only

[4] A California intermediate appellate court has also treated California's statute as amounting to content-based discrimination, not because of the legislature's original intent, but because of the historic origins of cross-burning. *In re Steven S.*, 25 Cal.App.4th at 606 ("Cross burning conveys a message – the Ku Klux Klan's creed of racial hatred. As such, it implicates the First Amendment's guarantee of freedom of speech (footnote omitted)"); see also *id.* at 612-613 (statute is permissible under *R.A.V.*, "although section 11411, subdivision (c), discriminates against malicious cross-burning on the basis of content"). The appellate court upheld the California statute as coming within the justifications recognized by the Court in *R.A.V.* Nevertheless, California respectfully submits that the appellate court erred in its conclusion about the statute's content neutrality. The Ku Klux Klan message of racial hatred referenced by the court is not always the message communicated by a cross-burning, and *on its face*, section 11411(c) prohibits the activity, whether or not the message is race-based, religion-based, or otherwise.

cross-burning that is for the purpose of intimidation or terrorizing – and, in California – only if the cross-burning is by means of a trespass onto the victim's property – there is "no realistic possibility that official suppression of ideas is afoot."

3. Indeed, the California and Virginia statutes fit within the two examples of permissible justifications that this Court recognized. First, to the extent that these statutes might be deemed to be content-based because of some *implicit* message of category-based intolerance that is communicated by the burning of a religious symbol, "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." See *R.A.V.*, 505 U.S. at 388. The California Legislature has made clear that the purpose of proscribing cross-burning is the protection of every person, "regardless of race, color, creed, religion, gender, or national origin," to be secure from fear and intimidation. Cal. Pen. Code § 11410. These are the very reasons why threats of personal injury are proscribable at all. See *R.A.V.*, 505 U.S. at 388 (recognizing that threats of violence are "outside the First Amendment"). And second, as has been repeatedly emphasized, the target of these cross-burning statutes is not the message, but the "secondary effect" of *intimidation* and, in California's case, *trespassory terrorizing*. See *In re Steven S.*, 25 Cal.App.4th at 612; Cal. Pen. Code § 11410. As this Court recognized, content-based discrimination against a subclass is permissible when the subclass "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is *'justified* without reference to the content of the . . . speech.'" *R.A.V.*, 505 U.S. at 389 (alteration in original) (citations omitted).

4. There is no dispute here that state justification for the cross-burning statute is compelling. St. Paul justified its cross-burning statute as "help[ing] to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." *Id.* at 395. This Court acknowledged that these interests are compelling. *Id.* But, by enacting a content-neutral cross-burning statute, Virginia, like California, has chosen to extend its concern to secure the right to a peaceful existence beyond historically discriminated groups, to all who might reasonably be intimidated and terrorized by similarly expressed threats of violence. This Court has recognized that, "'[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (citation omitted) (upholding ordinance restricting residential picketing).

CONCLUSION

For the reasons stated, Amicus Curiae State of California respectfully urges the Court to reverse the judgment of the Supreme Court of Virginia and uphold Virginia Code § 18.2-423 as a permissible regulation of conduct, consistent with the First Amendment.

Respectfully submitted,

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August 9, 2002

Supreme Court, U.S.
FILED

SEP 9 2002

OFFICE OF THE CLERK

No. 01-1107

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

BARRY ELTON BLACK, ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Rutherford Institute litigates and educates on behalf of constitutional rights, civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writs of certiorari and *amicus curiae* briefs in many cases in the Supreme Court, and have represented parties on the merits in several significant First Amendment cases.

The Court's *amicus* will address two issues raised by the Question Presented in the Petition. First, *amicus* will address the Commonwealth's contention that the cross-burning statute is not content-based, *i.e.*, that it is not targeted at the expressive aspect of cross-burning but at its effects. Second, *amicus* will discuss whether, assuming *arguendo* that racial intimidation is a social harm that can and ought to be proscribed by the Commonwealth (a prospect with which the Court's *amicus* certainly agrees), the cross-burning statute is narrowly tailored to achieve this proscription, or if other less restrictive alternatives can be (and are in fact) employed to achieve this end. The Court's *amicus* will also briefly address, with the forbearance of the Court, one important issue not included within the Question: whether the burden-shifting provision of VA. CODE ANN. § 18.2-423, which states that the burning of a cross under the circumstances proscribed by the statute "shall be *prima facie* evidence of an intent to intimidate a person or

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent are on file with the clerk of the Court. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

group of persons," denied Respondents their Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

SUMMARY OF ARGUMENT

Amicus respectfully submits that the Commonwealth of Virginia' contention that Va. Code Ann. § 18.2-423 is not viewpoint discriminatory is constitutionally untenable. It is a well-established maxim of First Amendment jurisprudence that a law targeting expression because of its anticipated offensive impact is viewpoint discriminatory, and cannot be upheld unless a compelling interest exists for it and no less restrictive means to further that interest exist. The Commonwealth can and does employ less restrictive means to proscribe the secondary effects of the speech at issue in this case.

Amicus also submits that the statute's burden-shifting provision, stating that the burning of a cross "shall be *prima facie* evidence of an intent to intimidate," contravenes the rights of trial by jury and due process protected by the Sixth and Fourteenth Amendments, respectively. The Supreme Court has repeatedly struck down burden-shifting statutes and jury instructions that place the burden of negating criminal intent upon the defendant as fundamentally opposed to traditional notions of fair play and justice in the adversary system.

ARGUMENT

I. VIRGINIA CODE ANN. § 18.2-423 IS A PROHIBITED CONTENT-BASED CRIMINAL STATUTE.

"[A] law imposing criminal penalties on protected speech

is a stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 122 S.Ct. 1389, 1398 (2002). "[E]ven minor punishments can chill protected speech...." *Id.* Specifically targeting cross burning, as opposed to other forms of hateful conduct, implicates legislative bias against the symbol itself. A broad range of constitutionally protected expressive conduct may cause substantial offense, intimidation and psychological harm (*e.g.*, flag burning, racist rhetoric, etc.). Yet the Commonwealth subjects to legislative sanction only two forms of expression, both symbolic: the burning cross and the Nazi swastika, as the Virginia Code also proscribes posting a swastika on another's property with the intent to intimidate.[2] Other than the symbol targeted, the language of both statutes is effectively identical. The enactment of these parallel statutes, which carve out for criminal sanction the two most hated symbols in America, leads inexorably to the conclusion that the Virginia legislature aimed to target and proscribe specific hateful speech and not simply to prevent intimidating conduct.

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[2] VA. CODE ANN. § 18.2-423.1 provides:

> Placing swastika on certain property with intent to intimidate; penalty; prima facie evidence of intent
>
> It shall be unlawful for any person or persons, with the intent of intimidating another person or group of persons, to place or cause to be placed a swastika on any church, synagogue or other building or place used for religious worship, or on any school, educational facility or community center owned or operated by a church or religious body.
>
> A violation of this section shall be punishable as a Class 6 felony.
>
> For the purposes of this section, any such placing of a swastika shall be prima facie evidence of an intent to intimidate another person or group of persons.

The Supreme Court has squarely and repeatedly rejected the proposition that government may restrict display of a symbol in order to avoid an adverse public reaction to its message. *Good News Club v. Milford Central School Dist.*, 533 U.S. 98, 119 (2001); *Cohen v. California*, 403 U.S. 15, 23 (1971). Mere "[u]ndifferentiated fear... of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969). The Virginia cross-burning statute cannot be meaningfully distinguished from the municipal hate crime ordinance struck down by the Court on this basis in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). The petitioner in *R.A.V.* was charged with violating the St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990), for burning a cross in the yard of an African-American family. Finding the ban an unconstitutional content regulation on symbolic speech, *id.* at 386, the Court rejected St. Paul's argument that the ordinance was constitutional because it targeted criminal conduct – racial intimidation – stating, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. "The point of the First Amendment is that majority preferences must be expressed in some fashion other then silencing speech on the basis of its content." *Id.* at 392. While St. Paul was entitled to express that hostility, it could not do so "through the means of imposing unique limitations upon speakers who (however benightedly) disagree." *Id.* at 396.

Like St. Paul, the Commonwealth's justifications for its cross-burning statute boil down to the notion that government may prohibit "controversial" speech because of its impact. That is the very essence of prohibited viewpoint discrimination, however – controlling speech because of the content of the message. *City of Erie, et al v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277 (2000); *Boos v. Barry*, 485 U.S.

312 (1988). States may control speech based on the "secondary effects" that ensue from it, but such secondary effects may not include the impact of the speech upon the audience. *City of Erie*, *supra* at 291 (approving nudity ban that reached nude dancing because "the ordinance d[id] not attempt to regulate the primary effects of the expression, *i.e.* the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health").

Thus, "to determine what level of scrutiny applies to the ordinance at issue here, we must decide 'whether the State's regulation is related to the suppression of expression.'" *Id.* at 289, quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Any prohibition on the secondary effects of controversial speech must be content and viewpoint-neutral. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 811 (1985); *Arkansas Educ. Tel. v. Forbes*, 523 U.S. 666, 676 (1998). "[P]ublic expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), quoting *Street v. New York*, 394 U.S. 576, 592 (1969).[3] *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). The Commonwealth criminally prosecuted Respondents for displaying the burning cross specifically because it was a burning cross, *i.e.*, an expression

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[3] *See also Hess v. Indiana*, 414 U.S. 105, 107 (1973)(statement "We'll take the f—ing street later" not punishable as "fighting words," since not directed to any person or group in particular); *Cohen v. California*, 403 U.S. 15, 16 (1971) (appearance in municipal court wearing a jacket bearing the words "F— the draft" not punishable as "fighting words."); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (viciously critical statements about various political and racial groups protected).

of a certain viewpoint. "[T]he specific motivating ideology or the opinion or perspective of the speaker [was] the rationale for the restriction." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). The burning cross is, perhaps alone among expressive symbols save the Nazi swastika, a virtually unequivocal communication: "a distinctive idea, conveyed by a distinctive message," *R.A.V. v. City of St. Paul*, 505 U.S. at 391-392. It is for this very reason that criminalizing its display cannot be regarded as content or viewpoint-neutral. One cannot conceive of a rhetorically ambiguous cross-burning.

No Supreme Court case holds that expressive conduct may be proscribed based upon its offensive impact.[4] The only narrow exceptions to the protections of the First Amendment under the Supreme Court's "limited categorical approach" are

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[4] This rule holds even where government legislative or executive officials have established fora in the context of governmental programs that further legitimate interests of the state, such as broadcast debates, *Arkansas Educ. Tel.* v. Forbes, *supra* (public broadcaster would be prohibited from excluding third-party candidate from public debate if based on viewpoint); funding of the arts; *NEA v. Finley*, 524 U.S. 569 (1998) (funding decisions for government arts program based on "aesthetic merit" could not discriminate on political viewpoint); funding for university student publications, activities and speech, *Rosenberger v. Rector & Visitors of Univ. of Va.*, *supra* (prohibiting viewpoint based exclusion of publication from university forum for funding); *Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (student association fees permitted provided neutrally allocated among student organizations); and programs for legal representation for indigents in civil matters, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down Congressional prohibition on constitutional challenges to welfare law by organizations receiving federal legal services funding).

for obscenity, defamation and "fighting words." *R.A.V. v. St. Paul*, 505 U.S. at 383. As reprehensible as Respondents' views are, "The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane." *Iota Xi Chapter of Sigma Chi v. George Mason Univ.*, 773 F.Supp. 792, 795 (E. Dist. Va. 1991), *aff'd*, 993 F.2d 386 (4th Cir. 1993); *Dambrot v. Central Michigan University*, 839 F.Supp. 477, 484 (E. Dist. Mich. 1993). In fact, the Court has recognized that the First Amendment regards dialogue and disputation as a desired end of protected expression, not just its unfortunate by-product:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Terminiello v. Chicago, 337 U.S. at 4.[5] The right to freely speak vile ideas, and the immediate harsh reaction they should generate from a healthy body politic, are tonic to a free society. An unspoken idea goes unchallenged, and its adherents may be emboldened by the false belief that their views are widely accepted, or would be embraced if allowed to be broadcast uncensored. It is only the scorching heat of public debate that withers a despicable idea.

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[5] *See Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("In the realm...of political belief, sharp differences arise. In both fields [politics and religion] the tenets of one man may seem the rankest error to his neighbor."); *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

II. THE STATUTE IS NOT NARROWLY TAILORED TO ACHIEVE THE VALID LEGISLATIVE END OF PREVENTING INTIMIDATING CONDUCT DIRECTED TOWARD MINORITIES BECAUSE VIRGINIA ALREADY EMPLOYS STATUTORY MEANS TOWARD THAT END THAT ARE NOT CONTENT-BASED.

VIRGINIA CODE ANN. § 18.2-423 cannot be regarded as narrowly tailored to achieve the end of preventing intimidating and threatening actions against racial minorities because less restrictive means are available and are already in fact employed by the Commonwealth. Apart from their expressive content, the actions of Respondents Elliott and O'Mara were in fact criminal under existing Virginia law.[6] It is a Class 6 felony to maliciously set fire to wood, fencing, grass or other flammable material that is capable of spreading fire to land, the very act committed by Elliott and O'Mara in burning an object on the victim's property. *See* VA. CODE ANN. § 18.2-86 (2001). As the Court observed in *Wisconsin v. Mitchell*, "The First Amendment does not protect violence." 508 U.S. 476, 484 (1993).

Moreover, the Commonwealth has already passed a lesser restrictive version of the cross-burning statute (although the statue at issue remains on the books). After the decision of the Virginia Supreme Court, the Virginia General Assembly enacted VA. CODE ANN. § 18.2-423.01, which was intended to redress the constitutional infirmities of the cross-burning statute. It provides:

---

[6] The Court's *amicus* does not believe that the actions of Respondent Black could be prosecuted by the Commonwealth under any properly drawn criminal statute.

> 18.2-423.01. Burning object on property of another or a highway or other public place with intent to intimidate; penalty
>
> A. Any person who, with the intent of intimidating any person or group of persons, burns an object on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury is guilty of a Class 6 felony.

History: 2002, cc 589, 600. This statute eliminates the reference to a "cross," replacing it with the content-neutral term "object." *Id.* The statute also eliminates the burden-shifting presumption of intent to intimidate present in § 18.2-423, the constitutional effect of which will be discussed below. Although the present case is not the proper forum to address the constitutionality of this new provision, it is clearly a less objectionable means to the end sought by the Virginia General Assembly.

III. THE BURDEN-SHIFTING PROVISION OF THE STATUTE VIOLATES RESPONDENTS' RIGHT TO DUE PROCESS.

Ordinarily, the Court will confine its review to federal questions raised by or fairly included within the questions presented to the Court. However, a respondent "may support the judgment [of the state court] in his favor upon grounds different from those upon which the court below rested its judgment," *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940), provided it is done only in "exceptional cases." *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983). The Court has stated, "consideration of issues not presented in the jurisdictional statement or petition for certiorari and not

presented in the [lower court] is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980). The Court has utilized the plain error doctrine to address constitutional infirmities of state criminal statutes targeted at speech in several important First Amendment cases, notably *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949) and *Stromberg v. California*, 283 U.S. 359 (1931).

The present case presents such an "exceptional circumstance." *Heckler, supra*. The issue of whether a statutory provision that shifts the burden of proof of an element of a criminal charge to the defendant comports with the due process provisions of the Fifth and Fourteenth Amendments has recently been characterized by the Court as "of surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

Although it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," *Patterson v. New York*, 432 U.S. 197, 201-205 (1997), "[t]he Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 265 (1989); *Apprendi*, 530 U.S. at 477; *In re Winship*, 397 U.S. 358, 364 (1970). Jury instructions relieving States of this burden violate a defendant's due process rights:

> Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.

Carella v. California, 491 U.S. at 263 (jury instructions allowing presumption against defendant of intent to steal rented vehicle after specific number of days have elapsed from the end of the lease term violated due process); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The Court's *amicus* respectfully submits that the Commonwealth's cross burning statute contravenes due process by depriving Respondents of the benefit of a jury of peers and proof beyond a reasonable doubt of criminal intent that is subject to the severest possible societal stigma and disapprobation. Where the state requires a criminal defendant to negate the existence of culpable *mens rea*, the determination that the defendant committed a reprehensible "hate crime" becomes almost equibly poised between establishing hate and absolving the defendant of animus. The Supreme Court has found sentencing schemes violative of due process where they impose an undue burden upon a defendant to negate a state of mind to avoid culpability. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684 (1975) (state could not impose burden on murder defendant to establish that he acted in the "heat of passion on sudden provocation" to reduce homicide to manslaughter); *Leary v. United States*, 395 U.S. 6 (1969) (due process prohibited penal provision authorizing jury to infer from defendant's possession of marijuana that he knew of the illegal importation). Further, "although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him." *Mullaney*, 421 U.S. at 702; *cf. Davis v. United States*, 160 U.S. 469 (1895) (reversing murder conviction because trial judge instructed jury it was their duty to convict if the evidence was equally balanced regarding the sanity of the accused). "[D]ue process demands more exacting standards." *Mullaney*, 421 U.S. at 702, n. 31. The higher the degree of

stigmatization resulting to the defendant from conviction, the clearer the jury's adjudication of culpability must be. *Mullaney*, 421 U.S. at 699-700; *Winship*, 397 U.S. at 363, 364. Because "the penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,'" *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968), quoting *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937), that societal judgment should be subjected to the highest evidentiary standard of protection for an accused perpetrator of a hate crime, such as cross burning, not only to protect the innocent accused, but to preclude a "rush to judgment" in circumstances which have the potential to inflame community sensibilities. For this reason, even apart from the question whether VA. CODE ANN. § 18.2-423 survives the stringent demands of strict scrutiny as a content-based restriction on speech, the statutory presumption of culpable state of mind contained in the statute violates the right of due process, and the statute cannot therefore pass constitutional muster.

CONCLUSION

As the Court noted in *Texas v. Johnson*:

> The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the market-place of ideas. We decline, therefore to create for the flag an exception to the joust of principles protected by the First Amendment.

491 U.S. at 418. Just as the First Amendment constrained the State of Texas from consecrating the meaning of the American flag by force of criminal law, it constrains the Commonwealth of Virginia from employing the force of law to sanction the

burning cross – and the meaning it stands for – as a desecration of the ideal of racial equality Americans hold dear.

Respectfully submitted,

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September 9, 2002

Supreme Court, U.S.
FILED
SEP 9 2002
OFFICE OF THE CLERK

No. 01-1107

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF AMICUS CURIAE COUNCIL OF CONSERVATIVE CITIZENS FILED IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST OF AMICUS CURIAE.[1]

The Council of Conservative Citizens is interested in this case because it ardently supports the right of freedom of expression of all of the citizens of the United States and of all persons who lawfully reside or sojourn within the boundaries of this nation. The particular emphasis of the Council is the protection of the expressive rights of the millions of Americans of British and European descent who hold to conservative views on matters of racial and ethnic relations. For this reason it submits this brief in support of the position of the Respondents Barry Elton Black, Richard J. Elliot and Jonathan O'Mara.

II. SUMMARY OF ARGUMENT.

While the burning cross has undoubtedly been utilized in the perpetration of criminal acts, it also has significance as a means of communication of political thoughts and sentiments. Because it is a symbolic expression of political speech, government cannot criminalize cross burning on account of the fact that various persons and groups who may have the occasion to view such conduct may become angry or fearful.

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[1] Pursuant to Rule 37(6) of the Court, no party to this action has written any portion of this brief. The Council of Conservative Citizens is the group solely responsible financially for the preparation of the document and not any party to this action. Sam G. Dickson, a member of the Council's Board of Directors, is the financial contributor to the process of preparing and submitting this brief.

The statute at issue, Va. Code § 18.2-423, is overbroad for the reason that it punishes someone who lights a cross solely with the intent of intimidating a person or persons. It is expansive because the term "intimidation" can simply connote symbolic expression which causes certain persons and groups to feel a sense of fear and anger merely on account of having viewed such a spectacle. Furthermore, it purports to punish someone who burns a cross on the basis that the defendant intended to intimidate another person or persons without requiring proof that such conduct did in fact intimidate someone.

Finally, the statute allows the trier of fact in any prosecution under this enactment to infer an intent to intimidate merely from the fact of burning a cross. For that reason it empowers the Commonwealth of Virginia to arrest and prosecute anyone who burns a cross in any circumstances regardless of the context in which such conduct took place.

The overbroad nature of this statute required it to be struck down regardless of the conduct of the Respondents because of the danger that this law poses to the exercise of First Amendments rights.

The Court must affirm the decision of the Supreme Court of Virginia if the Court is to continue to adhere to the "incitement to imminent lawless action" test for determining the legality of speech, particularly political speech, explicated in ***Brandenburg v. Ohio*, 395 U.S. 444 (1969)** and most recently reiterated and reaffirmed in ***Ashcroft v. Free Speech Coalition*, 535 U.S. ___, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)**.

The burning of a cross cannot be punished as so-called "hate speech" because of what many persons believe to be

the tendency of such expression to either cause or facilitate the commission of violent and terroristic acts against racial and religious minorities and other vulnerable groups. Speech and expression cannot be prohibited on the grounds that it may encourage violent conduct at some indefinite and undetermined future time. This precept must be as applicable to the putative consequences of provocative and unpopular political speech and expression as it is to the alleged deleterious social effects of depictions and portrayals of explicit sexual conduct, even those simulating such conduct on the part of minors.

III. ARGUMENT.

Despite the disdain and the revulsion that most people feel for such a sight, the burning cross is an expression of political thought and sentiment – typically the doctrine of white separatism. It is for that reason a mode of expression protected in its most elemental form by the First Amendment. "The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will not go unquestioned in the marketplace of ideas." ***Texas v. Johnson*, 491 U.S. 397, 418 (1989)**.

When the Virginia statute in question is examined, the overbroad and inexact nature of this enactment becomes self-evident. It declares that "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, or highway or other public place." Va. Code § 18.2-423. The statute does not further define what manner of conduct, other than the

burning of the cross itself, shall constitute the act of "intimidating". Nor have the Virginia courts adopted a narrowing construction of this term which explicitly states the proposition that the expression of political opinions is not embraced within the concept of intimidation insofar as the interpretation of this statute is concerned.

The lighting of a cross in an area where it is plainly visible to large numbers of minority group members is surely in one sense "intimidating". The person or persons who have undertaken such a mode of expression are thereby stating in the most unequivocal means possible their unyielding opposition to what they believe is a minority-liberal program of affirmative action in education and employment, "set asides" in the granting of government contracts, less restrictive immigration laws and other forms of government-sponsored empowerment of non-white ethnic and racial groups. A large number of non-whites – in all probability a decided majority of them – who view such a demonstration would for that reason be likely to feel a sense of fear and anger upon observing it and consequently they would undoubtedly describe themselves as having been "intimidated" because the cross burning transpired within their range of perception.

The principle of First Amendment jurisprudence is nevertheless axiomatic that speech and equivalent forms of expression can be neither prohibited nor punished because those persons who hear it or see it may be offended or otherwise detrimentally effected emotionally by it. ***Texas v. Johnson*, supra at 407-410 (1989); *Boos v. Barry*, 485 U.S. 312 (1988).** Consequently, the fact that a manner of speech or expression may have a tendency to coerce or intimidate some listeners is not a basis for holding that it falls outside the ambit of First Amendment

protection. In ***Thornhill v. Alabama*, 310 U.S. 88 (1940)** this Court held that peaceful picketing was entitled to constitutional protection even though the purpose of the picketing was to advise customers and prospective customers of an adversarial relationship existing between the employer and its employees and to thereby induce such customers not to patronize the employer. The constitutional protection afforded to such ostensibly coercive and intimidating speech was reaffirmed in ***N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 908-910 (1982)** when this Court held that the N.A.A.C.P.'s publication of the names of Black people who violated that organization's boycott of Port Gibson, Mississippi merchants could not subject that group to a successful civil lawsuit. The Court so ruled despite the fact that there was no doubt that this particular speech had had a substantial intimidating effect on those Blacks who did not desire to adhere to the N.A.A.C.P. strategy in the Port Gibson controversy.

The proscription contained in Va. Code § 18.2-423 must therefore be said to sweep within its circumference a great deal of conduct that would otherwise be fully protected expression. The statute in its entirety for that reason must be held to be overbroad and therefore unconstitutional. ***Broadrick v. Oklahoma*, 413 U.S. 601 (1973).**

This conclusion is buttressed by consideration of the second paragraph of the statute which states that "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." In Virginia "prima facie evidence" means evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted. ***Nicely v. Commonwealth*, 25 Va. App. 579, 490 S. E. 2d 281, 282 (1997).**

Allowing the state to establish a prima facie case against a defendant charged with a violation of the statute, sufficient to get the case to a jury, merely on the basis of that person's conduct in burning a cross in a public place or on the property of another without the introduction of any actual evidence of his or her intent in doing so directly contravenes this Court's holding in ***Watts v. United States*, 394 U. S. 705 (1969).** While at a political gathering assembled to protest the Vietnam War the defendant Watts said that "If they (referring to the United States Army) ever make me carry a rifle the first man I want to get in my sights is L.B.J. (speaking of then President Lyndon Johnson)". **394 U.S. at 706.** On the basis of that statement Watts was prosecuted and convicted of violating **18 U.S.C. § 871(a)**, the federal law that makes it a crime for any person to threaten the life of the President of the United States.

In reviewing Mr. Watts' conviction this Court upheld the constitutionality of **18 U.S.C. § 871(a)** but it further ruled that Mr. Watts could not be prosecuted for that crime in the circumstances in which he made the offending utterance.

> **... the statute initially requires the Government to prove a true threat. We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and**

> **public officials." *New York Times Company v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964). The language of the political arena, like the language used in labor disputes, see *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966) is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.**

394 U.S. 708.

In contrast, the Virginia statute would allow law enforcement authorities to arrest anyone charged with burning a cross in a public area, which could include such a defendant's own property. Such an unfortunate person could further be indicted and tried on such meager evidence. And according to this statutory scheme, the felonious intent can be implied from the singular act of the defendant in burning the cross.

Thus under the terms of this statute a defendant can be arrested, indicted and tried solely for lighting a cross regardless of the circumstances and context within which this expressive conduct took place. The mere possibility that a person could even be threatened with prosecution pursuant to this seriously flawed enactment mandated that it be struck down. Such judicial action was required notwithstanding the fact that not a few persons charged with violating the statute had, in fact, been engaged in

morally culpable conduct. For that reason alone the Virginia Supreme Court was amply justified in declaring this statute unconstitutional, particularly in light of its all-encompassing presumption of intent to intimidate arising merely from the exercise of this form of symbolic expression.

> **A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith v. People of the State of California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205. When the statutes also have an overbroad sweep, as here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that the defense of a criminal prosecution will generally assure ample vindication of con- stitutional rights is unfounded in such cases.**
>
> * * *
>
> **... we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of the First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of its success or failure.**

***Dombrowski v. Pfister*, 380 U.S. 479, 486, 487 (1965).**

Despite the palpable unconstitutionality of this statute, the Council does not dispute the proposition that Virginia or any other jurisdiction in the United States may properly pass an act which makes it illegal for anyone to

burn a cross on the property of another without that person's permission or to do so in close proximity to another person's home with the further intention of intimidating or terrorizing that person. The Council concedes the validity of such legislation because of its high regard for property rights and on account of the obvious duty of government to protect the tranquility and the sanctity of the homes of all of its citizens. See ***Frisby v. Schultz*, 487 U.S. 474 (1988)** (government can prohibit continuous picketing in front of a person's home).

In its decision striking down a statute of the state of Texas prohibiting the burning of the flag of the United States, the Court held that it was impelled to do so because a contrary opinion would effectively overrule much of its modern jurisprudence delineating the scope and protection of the First Amendment, particularly that concerning political speech and expression.

> **Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite such action." *Brandenburg v. Ohio*, 395 U. S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d. 430 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' argument that it need only demonstrate "the potential for a breach of the peace", Brief for Petitioner 37, and that every flag burning necessarily**

possesses that potential would be to eviscerate our holding in *Brandenburg*. This we decline to do.

***Texas v. Johnson*, supra at 409 (1989).**

Any careful weighing of the arguments both for and against the constitutionally of this Virginia statute must inexorably lead to the conclusion that this Court cannot reverse the decision of the Supreme Court of Virginia and still adhere to the Brandenburg formula, as upheld and reaffirmed in ***Texas v. Johnson.*** Intellectual integrity and the institutional necessity of maintaining a coherent body of First Amendment jurisprudence demands affirmance of the opinion of the lower court for that reason alone.

The Council anticipates that the most powerful arguments in support of the position of the petitioner in urging reversal will be the emotive ones. If they are not expressly set forth by the Commonwealth and the various amici who have submitted briefs in support of its position, they will certainly be a discernible undercurrent which will run through virtually all of the arguments advanced by that side of this controversy. The essence of that argument is this:

> **In an increasingly diverse and pluralistic America we can neither tolerate nor indulge the kind of hate-laden rhetoric and expression represented by the burning of a cross and by the open display of other such symbols. The corrosive and destructive ideas represented by these symbols do have palpable, real-life consequences. These consequences are the perpetration of hate crimes such as took place in Jasper, Texas several years ago – the James Byrd truck dragging case – and more generally the oppression and persecution of racial and ethnic minorities and other vulnerable groups such as gay people. Indeed, the most traumatic and horrific event of modern times – the Holocaust – was the end result of allowing in the name of "free speech" such pernicious discourse to permeate the infected societies out of which that terrible event arose.**

The Council will not respond to this argument because this Court, speaking through Justice Kennedy, has already done so in terms that are directly applicable to this case and which should clearly dictate its outcome. In ***Ashcroft v. Free Speech Coalition*, 535 U.S. ___, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)**, the Court grappled with the constitutionality of certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 et seq., which, among other things, in § 2256(8)(B) banned any visual depiction that "is, or appears to be, of a minor engaged in sexually explicit conduct". The target of that provision is what has come to be known as "virtual child pornography" – images that appear to depict minors which are produced by means other than the use of real children, as, for example, the production of computer-generated images and images of adults that have been electronically altered to appear to be minors.

One of the most powerful and forcefully advanced arguments of the proponents of the constitutionality of this provision, among whom were numbered the United States government speaking through its Solicitor General, was that such images had to be placed beyond the pale of First Amendment protection because the widespread dissemination of such materials to persons who have

sexual inclinations and attractions toward children would invariably encourage them to act on those impulses and to consequently molest and victimize children as a means of satiating their desires. The proponents of censorship in this very sensitive area of human sexuality understandably and plausibly argued that the fantasies of such persons would necessarily be fed by the widespread proliferation of such depictions if they were not criminalized and suppressed.

In speaking for the majority of this Court which held this and similar provisions of the act to be unconstitutional as violative of the First Amendment, Justice Kennedy expressly and emphatically rejected this "future harm" argument.

> **The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. *Stanley v. Georgia*, 394 U. S. 557, 566, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.**

> **To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley International Pictures Corp.*, 360 U. S., at 689, 79 S. Ct. 1362; see also *Bartnicki v. Vopper*, 532 U. S. 514, 529, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time". *Hess v. Indiana*, 414 U. S. 105, 108, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (per curiam). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action". *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam). There is here no attempt, incitement, solicitation or conspiracy. The government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.**

122 S. Ct. 1403.

The necessity of maintaining a coherent corpus of First Amendment law dictates that this Court cannot have varying standards for determining whether or not so-called hate speech can be banned because of its putatively harmful effects on society in contradistinction to those utilized in deciding whether or not sexually explicit materials can be proscribed because of their possible use in victimizing children. Elementary fairness dictates that all of the purveyors of speech and expression which is widely believed to be socially harmful in some respects must be "fed out of the same spoon" insofar as the judicial determination of the purview and contours of First Amendment protection of their views is concerned.

IV. CONCLUSION.

Clearly, the Supreme Court of Virginia made the correct decision in holding Va. Code § 18.2-423 to be unconstitutional and therefore unenforceable. A contrary decision would have been wholly inconsistent with the entire body of this Court's First Amendment jurisprudence as explicated up to April 16, 2002 when ***Ashcroft v. Free Speech Coalition*** was handed down. The decision of the Supreme Court of Virginia in ***Black v. Commonwealth*, 262 Va. 764, 553 S. E. 2d 738 (2001)** should therefore be affirmed by this Court.

This 9th day of September 2002.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2002

COMMONWEALTH OF VIRGINIA

PETITIONER

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT,
AND JONATHAN O'MARA,

RESPONDENTS

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF OF AMICUS CURIAE THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has filed *amicus curiae* briefs in the United States Supreme Court, the Federal Courts of Appeals, and in numerous state courts. In the instant matter as it pertains to Respondent Barry Black, the Center filed briefs as *amicus curiae* in the Circuit Court of Carroll County, the Virginia Court of Appeals, and the Virginia Supreme Court. Consent to file in this Court was granted by all the parties.

NATURE OF THE CASE AND STATEMENT OF FACTS

This matter involves a consolidated appeal arising out of two separate incidents and three convictions of violating Virginia Code § 18.2-423, which reads:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

The first incident took place on May 2, 1998 in Virginia Beach, Virginia. Respondents Richard J. Elliott and Jonathan O'Mara attended a party at the home of David Targee. While at the party, Elliott told several people that his neighbor, James J. Jubilee, an African-American, had complained about the discharge of firearms in Elliott's backyard. In response, Elliott suggested they burn a cross in Jubilee's yard. Elliott, O'Mara, and Targee constructed a crude wooden cross in Targee's garage, transported it to Jubilee's yard, placed it in the ground, and lit the cross.

The second incident occurred on August 22, 1998 in Cana, Virginia. Respondent Barry Elton Black led a Ku Klux Klan rally on private property. The rally was conducted with the permission of the landowner, who was present during the rally. In the course of the rally, Klan members set fire to a cross, approximately 25 to 30 feet in height. The burning cross was observable from parcels of land adjoining that on which the rally took place. While the cross burned, the hymn *Amazing Grace* played over a loudspeaker system. In a jury trial in the Circuit Court of Carroll County, Respondent Black was convicted of violating Virginia Code § 18.2-423.

In a consolidated appeal, the Virginia Supreme Court reversed the convictions of O'Mara, Elliott, and Black, finding that Virginia Code § 18.2-423's targeting of cross burning was a viewpoint–based restriction in violation of the First Amendment. *Black v. Commonwealth*, 262 Va. 764 (2001).

SUMMARY OF ARGUMENT

This case presents a stark contrast between two values of the highest order within our Constitutional system. On the one hand, the Commonwealth admirably seeks to regulate hateful actions and expression that threatens its citizens. Yet whatever sanctions government may impose for this purpose must satisfy the rigorous standards established by this Court for the protection of free expression under the First Amendment. The policies reflected in the statute under challenge in this case are wholly consonant with the laudable goals of protecting citizens from fear and intimidation. Yet, as the Virginia Supreme Court ruled, the means chosen by the Commonwealth to serve that end restricts expression protected by the First Amendment. For that reason, they may not be used even for the worthiest of purposes.

Moreover, states possess constitutionally acceptable means for achieving these goals. The activity charged as criminal in this case is indisputably expressive, however hateful and abhorrent it may be to thoughtful citizens. Indeed, were the burning of a cross not highly communicative, it is doubtful that states would seek so consistently to punish the act. Because cross burning is expressive, and conveys a distinctive message to those who view it, a statute that punishes those who burn crosses must be viewpoint-neutral. The statute must also be precise enough to afford adequate guidance to persons who are potentially subject to its provisions. The scope of such a law must not be so broad as to reach, and

potentially subject to legal sanctions, any substantial amount of expression that the First Amendment protects. The challenged statute fails appreciably to meet each of these tests. It is for these reasons that *amicus* urges affirmance of the judgment of the court below.

I. CRIMINAL SANCTIONS IMPOSED ON EXPRESSIVE ACTIVITY MUST INVOKE A RECOGNIZED EXCEPTION TO THE FIRST AMENDMENT'S PROTECTIONS.

As the court below recognized, the burning of a cross is undeniably expressive activity, "however pernicious the expression may be." *Black*, 262 Va. at 771. It is as fully expressive as the actions which this Court found to be communicative in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969) (wearing of armbands) and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the United States flag). In such cases, and many others involving nonverbal expression, this Court has insisted that such expression may be punished only under conditions that fully satisfy the safeguards of the First Amendment. Most clearly, a particular message may not be made the subject of criminal sanctions because government finds objectionable its content or the viewpoint it expresses. While this principle emerged most clearly in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), its roots trace to much earlier decisions, *e.g., Schacht v. United States*, 398 U.S. 58, 63 (1970)("[A law] which leaves Americans free to praise the war in Vietnam but can send persons...to prison for opposing, cannot

survive in a country which has the First Amendment.") Even where, as in *R.A.V.* itself, a category of expression may be presumptively unprotected, government may not selectively favor or disfavor particular messages. The only question posed by the present case, and one which the parties centrally dispute, is whether or not the challenged statute selectively disfavors a particular message.

A. Virginia Code § 18.2-423 is a content-based restriction on speech.

Perhaps because the Commonwealth recognizes the presumed unconstitutionality of content-based restrictions on speech, a substantial portion of petitioner's brief argues that Virginia Code § 18.2-423 is content-neutral because its sanctions apply to all persons, regardless of their motives, who burn crosses with an intent to intimidate. *See, e.g., Brief of Petitioner*, Commonwealth of Virginia, at 9. But neutral or uniform *application* of a law, in terms of the persons who are subject to its sanctions, in no way removes or avoids a charge of *selectivity in the content* of its provisions, of the type that the court below found to be a fatal flaw in the statute now under review. In addition, the Commonwealth's argument reflects a basic misperception of First Amendment jurisprudence because it confuses restrictions that are content-based with those that are directed against a particular viewpoint. While all viewpoint restrictions are content-based, not all content-based restrictions necessarily involve viewpoint discrimination. A

content-based regulation of speech is one that is directed at the subject matter - the content - of the expression. A content-based statute is presumptively invalid unless it disfavors, or singles out for special treatment, an entire category of speech that traditionally has received less than full First Amendment protection. "Content-based restrictions are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas..." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) (citations omitted). The fact that a statute criminalizes obscenity, for example, does not mean that the statute is content-neutral. Rather, an obscenity statute is a ban upon a category of expression to which, despite its content-based focus, the presumption of constitutional invalidity does not apply.

By recognizing that "the focus of the Virginia statute is intimidation," *Petitioner's Brief* at 9, the Commonwealth effectively concedes that the statute is directed at the content of the expression, specifically at threats. The inescapable conclusion that Virginia Code § 18.2-423 is content-based gains added force from the fact that the very harm that the statute seeks to prevent is the probable reaction or response of persons who witness the highly evocative burning of a cross. Such a concern, however laudable it may be as a matter of state policy or legislative action, hardly serves to remove the content-selectivity of a statute that reflects such a focus. As this Court has consistently cautioned, "Listener's

reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (1992).

The Commonwealth correctly argues, however, that even if Virginia Code § 18.2-423 is content-based, that fact does not entirely dispose of First Amendment analysis. If, indeed, such a law could be shown to target specifically an entire category of unprotected expression, it might nonetheless survive scrutiny. Threats, for example, comprise a category of proscribable speech. *See, e.g., Watts v. United States,* 394 U.S. 705 (1969). A statutory ban on all threats – at least all "true threats" within the meaning of the *Watts* decision – would presumably pass constitutional muster. Accordingly, the proper inquiry here is whether Virginia may single out, within the larger category of all threatening expression, only those threats that involve the burning of a cross. The court below concluded that such a specific focus – admittedly a form of expression with great potential to instill fear in viewers – rendered the law constitutionally infirm.

B. The Virginia Supreme Court correctly ruled that Virginia Code § 18.2-423 unconstitutionally discriminates on the basis of viewpoint.

The Virginia Supreme Court correctly ruled that Virginia Code § 18.2-423 is "analytically indistinguishable" from the ordinance that this Court invalidated in *R.A.V.* At issue in *R.A.V.* was a St. Paul, Minnesota ordinance that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

505 U.S. at 380 (quoting St. Paul, Minn., Legs. Code § 292.02 (1990)).

Although this Court felt bound by the Minnesota Supreme Court's "authoritative statement that the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)," it nevertheless found the statute facially unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subject the speech addresses." *R.A.V.*, 505 U.S. at 381. Because "[i]n its practical operation... the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination," Minnesota's claim that the statute criminalized only "fighting words" did not save the law under the First Amendment. *Id.* at 391.

In its brief before this Court, the Commonwealth presses the validity of a law that is, in several respects, strikingly similar in structure and effect to the St. Paul ordinance. First, Virginia Code § 18.2-423 specifically targets a highly evocative symbol that reflects virulent notions of racial supremacy. *See id.* at 392. Indeed, the potential harm to First Amendment freedoms is even

greater in this case than it was under the St. Paul ordinance, because Virginia Code § 18.2-423 makes it unnecessary for the Commonwealth to initially establish any element of mens rea, and instead treats the expressive activity itself as prima facie evidence of an intent to intimidate.

Second, in this case as in *R.A.V.*, the fact that a criminal statute targets expression falling within a category of less than fully protected speech in no way avoids First Amendment scrutiny. The Commonwealth's claim that the targeted expression entails "threats" does not differ in substance from the comparable claim in *R.A.V.* that the conviction was valid because the focus was "fighting words." The rationale of *R.A.V.* – that government may not disfavor certain viewpoints even when they are conveyed by less than fully protected means – applies with equal force here: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *Id.* at 392.

Nor, as the Commonwealth argues, does the fact that the ordinance in *R.A.V.* prohibited cross burning carried out "on the basis of race, color, creed, religion or gender," whereas Virginia Code § 18.2-423 contains no such explicit viewpoint-based provision, serve to distinguish the two cases for First Amendment purposes. To reach that conclusion would require this Court to review Virginia Code § 18.2-423 wholly out of its context, taking no note of the real world rationale for such a statute. Any notion

that the Virginia statute served a purpose markedly different from the St. Paul ordinance is in fact belied by the Virginia Supreme Court's finding that the historical context of cross burning makes it "clear that the Commonwealth's interest in enacting the cross burning statute is related to the suppression of free expression." *Black*, 262 Va. at 775. Further, such a non-contextual approach to analyzing Virginia Code § 18.2-423 would also be wholly at variance with this Court's analysis in *United States v. Eichman*, 496 U.S. 310 (1990), which held that First Amendment scrutiny is not avoided because the terms of a statute may not *expressly* target only a single message or viewpoint. Such exacting review is appropriate where, as here, analysis of the law and its impact reveal beyond doubt that "the Government's asserted interest is related to the suppression of free expression." *Id.* at 315 (internal quotation marks omitted).

Nonetheless, the Commonwealth insists that, in contrast the federal statute invalidated in *Eichman*, the target of Virginia Code § 18.2-423 is not the message or viewpoint conveyed by the burning of a particular object, but is instead the threat potentially created, or the fear potentially instilled, by such an act. "The Virginia General Assembly long ago enacted a ban on cross burning, but only when accompanied by an attempt to intimidate someone." *Petitioner's Brief at* 9. "Where there is no intent to intimidate, the statute does not apply." *Id.* at 18. "[A]n *innocent* cross burner—i.e., one who burns a cross *without* an intent to

intimidate...is not barred by the statute." *Id. at 43* (emphasis in original).

The Commonwealth seeks to avoid the impact of *Eichman* upon comparable viewpoint discrimination grounds simply by arguing that individuals who wish to use the symbol of a burning cross to express their views are free to do so as long as they do it without the intent to threaten another person.[1] The Virginia Supreme Court correctly rejected this theory, recognizing that the real target of Virginia Code § 18.2-423 is *all* cross burnings and the racist values they have come to symbolize. As the court below observed, "[w]hen asked how the Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning." *Black*, 262 Va. at 776. It seems abundantly clear that the Commonwealth takes the position that all cross burnings should be prohibited because of their potential effect upon those who view them. "Cross burning is a form of intimidation – a threat of harm." *Petitioner's Brief* at 34. "Cross burning presents a special case of intimidation." *Id. at 37.* "To treat cross burning as intimidation is simply to recognize the 'shorthand' already in use

[1] The Commonwealth further attempts to distinguish *Eichman* on the grounds that it involved flag desecration, "an act that enjoys the full protection of the First Amendment," whereas this case involves the constitutionally proscribable expression of threats. *Petitioner's Brief* at 18. This is an apples and oranges comparison. Such a distinction would be valid only if the statute struck down in *Eichman* prohibited flag desecration undertaken with the intent of intimidating another person. Ironically, under the Commonwealth's theory such a statute would be constitutional because it targets not the expressive act of burning a flag but the

and already understood by perpetrator and victim alike." *Id.* at 41. Thus, the Commonwealth seems to claim both that (1) Virginia Code § 18.2-423 is viewpoint-neutral because its sweep does not include cross burnings undertaken *without* an intent to intimidate, and, (2) every cross burning is an act of intimidation. The Virginia Supreme Court correctly held that "the Commonwealth cannot have it both ways." *Black*, 262 Va. at 776.

Virginia Code § 18.2-423 unmistakably targets the viewpoint that the symbolic act of burning a cross conveys. To consider the statute viewpoint-neutral would require a finding that the concern motivating §18.2-423 is simply the igniting of two pieces of wood joined at right angles. To the contrary, this section singles out for criminal punishment a particular and widely recognized message, on the basis of its content and viewpoint, and because of its potential effect upon observers. The public burning of a cross is a symbolic act deeply offensive and odious to the vast majority of American citizens, but not to all. For those few, a burning cross is a symbol of white supremacy. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770–71 (1995) (Thomas, J., concurring). That Virginia Code §18.2-423 may not specify the Ku Klux Klan as the only potentially affected speaker does not avoid constitutional challenge, for this section clearly targets the use of a particular symbol that has come to represent the Ku Klux Klan and its viewpoint on issues of race. *See id.* (Thomas, J., concurring). By targeting a particular symbol,

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proscribable expression of intimidation.

the Commonwealth essentially is attempting to do what concerned this Court in *Cohen v. California*, when it stated, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." 403 U.S. 15, 26 (1971).

C. The dictates of the First Amendment cannot be avoided by simple word play.

The clear implication of the Commonwealth's defense of the Virginia Code § 18.2-423 is that the phrase "with the intent of intimidating" serves to validate, under the First Amendment, a prohibition that would otherwise be suspect as content- and viewpoint-specific regulation of expression. The Commonwealth's rationale, for example, would seem to justify a statute that criminalized "the public display of a cross erected with the intent to intimidate," and went on to state that "any such display of a cross is prima facie evidence of an intent to intimidate." So long as a statute is limited to displaying a cross "with the intent to intimidate," the Commonwealth would presumably argue, the First Amendment would be satisfied. It seems, however, highly doubtful that any court would rule against the myriad Christian churches which undoubtedly would mount a facial challenge to any such statute. These churches would prevail in their challenge for the same reason that appellant must succeed in his challenge to

Virginia Code § 18.2-423 – the symbolic expression targeted by such a statute is fully protected under the First Amendment.

Such a hypothetical scenario, though analytically apposite, casts in bold relief the basic flaw in the Commonwealth's argument: The insertion of the phrase "with the intent of intimidating" as a talismanic appendage to an otherwise viewpoint discriminatory statute simply will not satisfy the First Amendment, particularly when government, as discussed below, has viewpoint-neutral means at its disposal to protect citizens from intimidation.

D. The Commonwealth is not without constitutionally valid means by which to achieve its laudable goals.

Invalidating Virginia Code § 18.2-423 does not deprive the Commonwealth or other states of the capacity to enact and enforce general and viewpoint-neutral laws against cross burning and other forms of similar conduct. In *R.A.V.*, this Court stressed both the obligation of, and the options for, government in areas where overly broad regulation abridges protected expression:

> [T]he danger of censorship presented by a facially content-based statute requires that that weapon be employed only where it is necessary to serve the asserted [compelling] interest. The existence of adequate content-neutral alternatives thus undercut[s] significantly any defense of such a statute, casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law.

505 U.S. at 395 [internal quotation marks and citations omitted, alterations in original]. Such content-neutral alternatives would involve, for example, targeting conduct such as trespass and arson. Government may also narrowly target certain forms of expression such as threats to kill or do serious bodily harm, *cf.* Virginia Code § 18.2-60. In *United States v. Hayward*, two trespassing cross burners were convicted under a content-neutral federal law prohibiting the use of "*fire* or an explosive to commit a felony." 6 F.3d 1241, 1246 (7th Cir. 1993)(emphasis added).

Any concern that striking down Virginia Code § 18.2-423 could benefit lawless actors by invalidating other laws aimed at intimidation seems unwarranted. That suggestion assumes, incorrectly, that intimidation is the gravamen of every offense in which "intimidation" is an element. In fact, in most such crimes the gravamen of the offense is the specific goal or object of coercing another person to act – or to refrain from acting – in ways that the person would not otherwise have acted. *See, e.g.*, Virginia Code § 18.2-47 (kidnapping); Virginia Code § 18.2-61 (rape); Virginia Code § 18.2-460 (obstruction of justice); Virginia Code § 24.2-1000 (hindering election officials); Virginia Code § 40.1-53 (interference with employment). In making such actions as these unlawful, intimidation is not the focus of the criminal charge, but rather the means by which one carries out what is clearly an illegal – and constitutionally unprotected – activity or enterprise. In the instant case, by contrast, intimidation is the end result which the

Commonwealth suggests it wishes to prevent; it may not do so, however, by prohibiting lawful, constitutionally protected speech or activities.

Virginia Code § 18.2-423 makes criminal the expression of a particular viewpoint, hateful and abhorrent though it may be to the vast majority of Virginians and Americans. That is precisely what the Supreme Court has consistently ruled that states may not do, however laudable their reasons. The Commonwealth, like St. Paul, Minnesota, "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 505 U.S. at 396.

II. THE SWEEP OF VIRGINIA CODE § 18.2-423'S PROHIBITION REACHES EXPRESSION BEYOND "TRUE THREATS" AND IS THEREFORE CONSTITUTIONALLY OVERBROAD.

Thus far, *amicus* has accepted arguendo the Commonwealth's assertion that Virginia Code § 18.2-423 prohibition of cross burning "with the intent of intimidating" is a prohibition of "true threats," a category of expression that receives less than the full protection of the First Amendment. Yet, as Justice Kinser noted in a concurring opinion, under Virginia law "[t]here is a difference between threat and intimidation." *Black*, 262 Va. at 780 (Kinser, J. concurring)(quoting *Sutton v. Commonwealth*, 228 Va. 654, 663

(1985)). "An act performed with the intent to intimidate... does not rise to the same level as a threat..." *Id.*

Freedom of speech requires the tolerance of expression that makes us uncomfortable, or that even frightens us. "[I]n our system, *undifferentiated fear* or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508 (emphasis added). Further, fear has sources other than threats. "Any variation from the majority's opinion may inspire fear." *Id.*

Despite the Commonwealth's claim to the contrary, it is readily apparent that the "intimidating" language of Virginia Code § 18.2-423 applies to expression beyond what this Court has deemed to be a "true threat." The precedent that is consistently cited for the principle that "true threats" receive little (if any) First Amendment protection is *Watts v. United States*, 394 U.S. 705 (1969). *See, e.g., Petitioner's Brief* at 14, fn. 7. Few who cite *Watts* for this purpose, however, call attention to the fact that the expression at issue there - a fairly explicit threat to kill the President of the United States - was found, when viewed in context, to be "political hyperbole" and therefore constitutionally protected. *Watts*, 394 U.S. at 708. "[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 707. To cite

Watts without any reference to its factual disposition misconstrues the holding of the case and is misleading.

The statute at issue in *Watts* provided, in pertinent part, that it was unlawful to make "any threat to take the life of or inflict bodily harm upon the President of the United States..." *Id.* at 705. Thus, the law explicitly defined both the target of the threat and that it had to be a threat of physical harm. Without these or similar specifics in a threat prohibition, the danger is far greater that "political hyperbole" and other forms of protected expression will fall under the sweep of the prohibition. Although the First Amendment does not protect threatening behavior, "[w]hen such conduct occurs in the context of constitutionally protected activity, [ ] 'precision of regulation' is demanded." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (citing *NAACP v. Button*, 371 U.S. 415, 438. n52 (1963)).

The best evidence that Virginia Code § 18.2-423 lacks such requisite precision is the conviction of Barry Black. Mr. Black was convicted for burning a cross at a political rally. The rally took place on private property, with the permission of the owner, in a location where it was far from certain that any members of the groups (much less any specific individuals) that were targets of his alleged intimidation would see the burning cross. A conviction under these circumstances would not be possible even under the three cross burning statutes from other states that the Commonwealth cites in support of Virginia Code § 18-2-423.

Under the California and Florida statutes at issue in, respectively, *People v. Steven S.*, 31. Cal. Rptr. 2d 644 (Cal. App. 1 Dist. 1994), and *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995), there is a requirement that the cross burning take place on the property of another without the permission of the owner. (Indeed, in *Steven S.*, the court *specifically* recognized that a cross burning at a Ku Klux Klan rally would be constitutionally protected. 31 Cal. Rptr. 2d at 648.) In its brief, the Commonwealth questions the distinction between burning a cross on someone's yard without their permission and burning a cross just beyond that same person's property line. *Petitioner's Brief* at 33, n. 19. The answer to the Commonwealth's query is that linking criminal culpability with unauthorized access to property limits the circumstances under which a prosecution can be initiated. Thus, the potential of the statute reaching protected expression is greatly reduced.[2]

Although the Washington statute at issue in *State v. Talley*, 858 P.2d 217 (Wash. 1993) contained no requirement of owner

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[2] Where the speech takes place on private proper with the owner's consent or at the owner's invitation, the extension of criminal sanctions is particularly ominous for both free speech rights and property rights. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43 (1994)(placing of political signs at private residence has distinct expressive value); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)(potential offensiveness to unwilling viewers of movies with scenes of nudity is insufficient to justify ban of such movies being shown at privately-owned drive-in theaters with screens visible from the street); *Spence v.Washington*, 418 U.S. 405 (1975)(property concept central in overturning conviction of individual who, on private property, violated statute prohibiting improper use of American flag); *see also* Norman Dorsen, Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, Supreme Court Review, 195 (1982).

authorization, it did contain a limiting provision requiring that the context of the cross burning be taken into account.

> [I]t does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way *unless the context or circumstances surrounding the words or conduct* places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person . . . [.]

Id. at 221 (emphasis added). On the basis of this provision, the Washington State Supreme Court affirmed *the dismissal of charges* against a defendant who burned a cross on his own property but was targeting a group of African-Americans on the adjoining property. *Id.*

Virginia Code 18.2-423 contains no provisions to ensure that its sweep is limited to the "true threats" envisioned in *Watts v. United States*. Without such limiting provisions, it is unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to affirm the judgment of the Supreme Court of Virginia.

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